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No. 95-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a $2,250,000 punitive damage award, which plaintiff recovered on malicious prosecution and abuse of process claims against his sister and brother-in-law where plaintiff's out-of-pocket loss was approximately $34,000 in legal fees, is so excessive as to violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Laurance B. Wolfberg and Carolyn Wolfberg respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reprinted at App. 1a-18a. The Court of Appeals' unpublished order denying the petition for rehearing and suggestion for rehearing in banc is reprinted at App. 19a-20a. The unpublished order of the District Court denying petitioners' post-trial motions is reprinted at App. 21a-28a. The opinion of the Supreme Court of Oklahoma, answering questions certified by the Court of Appeals in this case, is reported at 890 P.2d 895, and reprinted at App. 29a-51a.

JURISDICTION

The District Court had jurisdiction of this case under 28 U.S.C. § 1332. The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. That court issued its order denying petitioners' timely petition for rehearing on June 16, 1995, and this petition is being filed within ninety days of that date. This Court therefore has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clauses of the Fifth and Fourteenth Amendments, which are set out verbatim at App. 60a.

STATEMENT OF THE CASE

This case arises from a dispute between a brother (respondent Robert I. Greenberg) and sister (petitioner Carolyn Greenberg Wolfberg) over the administration of a family trust, and a falling-out between two brothers-in-law (Mr. Greenberg and petitioner Laurance B. Wolfberg, who is the husband of Mrs. Wolfberg) who were once business partners. This family feud escalated into civil litigation, and Mr. Greenberg now has a $2,250,000 punitive damage award on claims of malicious prosecution and abuse of process against his sister and brother-in-law.

Statement of the Facts

Respondent is a trustee and Mrs. Wolfberg is a potential beneficiary of the Mal Greenberg Testamentary Trust ("Greenberg Trust"), which was established by their now-deceased father. App. 2a. Mr. Wolfberg and respondent were once partners or co-owners in several business ventures, including the Green Wolf partnership and Service Business Forms. App. 2a-3a. In 1982, Mr. Wolfberg and respondent agreed to separate their business interests, and Mr. Wolfberg acquired control of all the shares of Service Business Forms. App. 2a-3a. As part of this acquisition, Service Business Forms executed a note to the Greenberg Trust to purchase shares held by the trust. App. 2a-3a.

In subsequent years, the relationship between petitioners and respondent deteriorated, leading to the five lawsuits described below. These cases were the predicate lawsuits for the malicious prosecution and abuse of process claims brought by respondent against petitioners in the present action. App. 3a.

Case # 1

Mr. Wolfberg filed a complaint against respondent in the United States District Court for the Western District of Oklahoma in November 1986, seeking the dissolution and accounting of Green Wolf partnership, as well as damages for respondent's alleged conversion of a partnership loan to his personal use. App. 3a. Although the court denied Mr. Wolfberg's claim for damages, Mr. Wolfberg succeeded in obtaining dissolution of the partnership and an accounting, and respondent's motion for attorneys' fees and costs was denied by the magistrate, who concluded:

> [Mr. Wolfberg's] lawsuit was not totally groundless. He succeeded in obtaining an accounting and final dissolution of the partnership. While the Court has held that [Mr. Wolfberg] had not proved his cause of action based on breach of fiduciary duty, this holding does not presume the lawsuit was frivolous. On the contrary, [Mr. Wolfberg] had a legally and factually arguable claim for relief that was ultimately resolved against him.

App. 59a. The Tenth Circuit affirmed, and this Court denied Mr. Wolfberg's petition for a writ of certiorari. App. 3a-4a.

Case # 2

This case was brought in Oklahoma state court in November 1986 by petitioners and Service Business Forms against respondent in both his individual and trustee capacities, as well as against the other trustees of the Greenberg Trust. App. 4a. The claims, which alleged breach of contract and fraud, were voluntarily dismissed without prejudice. App. 4a.

Case # 3

Mrs. Wolfberg brought suit in Oklahoma state court against respondent and the other trustees of the Greenberg Trust in December 1986, seeking an accounting, removal of trustees, dissolution of the trust, and distribution of property, as well as damages from respondent individually for breach of fiduciary duty. App. 4a. The case was voluntarily dismissed without prejudice. App. 4a.

Case # 4

In this case, filed in Kansas state court by Mrs. Wolfberg against the trustees of the Greenberg Trust in September 1987, Mrs. Wolfberg sought removal of the trustees for hostility. App. 4a. The court found in favor of the trustees, and no appeal was taken from the judgment. App. 5a.

Case # 5

Neither Mr. Wolfberg nor Mrs. Wolfberg was a party to this case, which was brought in December 1986 by respondent and the other trustees of the Greenberg Trust against Service Business Forms. App. 5a. In this action, filed in the United States District Court for the Western District of Oklahoma, the trustees sued to collect on the note that had been given by Service Business Forms to the Greenberg Trust. App. 5a. In March 1987, Service Business Forms counterclaimed on the ground that the note was unenforceable until respondent disclaimed any interest in the note. App. 5a. The district court granted summary judgment to the trustees on their claim and denied the counterclaim. App. 5a. The Tenth Circuit affirmed, and this Court denied the petition for a writ of certiorari filed by Service Business Forms. App. 5a.

Proceedings Below

The present action was filed in August 1990, and brought to trial a year later. At trial, respondent argued that the five predicate cases discussed above established the

liability of petitioners for malicious prosecution or abuse of process. App. 3a.

With respect to damages, respondent testified that his unreimbursed "out-of-pocket" legal fees for the five predicate actions totalled "around $34,000." App. 56a. In addition, respondent testified that, as a result of the time he had spent on the lawsuits, he had not been able to participate in a new golf course venture in which he would have received a ten percent interest that he valued at approximately $250,000. App. 53a.

On August 22, 1991, the jury returned a verdict in favor of respondent on all issues, awarding $284,000 in "general damages" against both petitioners, $500,000 in punitive damages against Mrs. Wolfberg, and $1,750,000 in punitive damages against Mr. Wolfberg. App. 2a. The District Court denied petitioners' post-trial motions. App. 21a-28a.

In rejecting petitioners' motion for remittitur of damages, the District Court stated—as if the issue before it were merely a matter of "evidence" rather than one of constitutional significance—that "there is no evidence that the punitive damages awarded were excessive." App. 27a. The court also asserted that "[t]he record is replete with evidence of the net worth of the parties" and that "[t]estimony concerning the profit on the Wolfbergs' home alone could leave the jurors ample information to base their damages awards on." App. 27a.[1] The court, however, engaged in no analysis of the size of the punitive damage

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[1]The District Court did not make any findings concerning the specific net worth of petitioners or the amount of "profit" on the sale of their home. Although respondent asserted in closing argument that petitioners had a net worth of over $20 million, petitioners' post-trial net worth was listed as $7,352,339 in their application for a supersedeas bond, a copy of which was filed with the District Court as an exhibit to petitioners' post-trial pleadings.

award other than to state that "the Wolfbergs' self-described 'smart money' had to have been enough to genuinely smart any budget." App. 27a.

On May 11, 1995, the Tenth Circuit issued its opinion affirming the District Court's judgment. App. 1a-18a. That court recognized that punitive damages were imposed on petitioners for conduct that had never previously been declared tortious by an Oklahoma state or federal court. The Court of Appeals observed that "[t]here is apparently no Oklahoma case law on a malicious prosecution action grounded on repetitive civil proceedings." App. 6a. Also, that court recognized that this case presented several issues of first impression under Oklahoma law by granting petitioners' motion for certification of four questions of law to the Supreme Court of Oklahoma.[2] Nevertheless, the court below upheld the punitive damage awards in their entirety. In a four-sentence discussion, the court rejected petitioners' arguments that the awards were "excessive considering the defendants' net worth," App. 17a, and that the Oklahoma statute that governs punitive damage awards, as applied in this case, violates federal due process, App. 17a. ("The Oklahoma statute does not violate due process as the Appellants urge.").

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[2]These issues were: (1) whether the five cases discussed above could "be considered as a single suit (the "Process") for purposes of alleging malicious prosecution and abuse of process claims regardless of the varied disposition and success of the various separate actions"; (2) "whether the statute of limitations applicable to both the malicious prosecution and abuse of process claims should be applied to each individual action or to the Process"; (3) whether the statute of limitations for the abuse of process claim began "to run with the commencement or the termination of each individual action or of the Process"; and (4) "[w]hat . . . the duration of the statute of limitations" is "on an abuse of process claim." App. 29a-30a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED—WHICH CALLS UPON THE COURT TO DEVELOP THE DUE PROCESS STANDARDS FOR EXCESSIVENESS REVIEW OF PUNITIVE DAMAGES—IS SUBSTANTIALLY SIMILAR TO A QUESTION THAT THIS COURT HAS GRANTED CERTIORARI TO REVIEW IN *BMW*

"'[P]unitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values.'" *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 n.8 (1991) (quoting D. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 739 (1989)). Indeed, as this Court has recently recognized, "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994). To guard against this danger, the Due Process Clauses of the Fifth and Fourteenth Amendments impose "substantive limits 'beyond which penalties may not go.'" *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (quoting *Seaboard Air Line R. Co.* v. *Seegers*, 207 U.S. 73, 78 (1907)); *see also Honda*, 114 S. Ct. at 2335 ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damage awards.").

In *Honda*, this Court held that judicial review of the size of punitive damages awards is required as a matter of due process. *See id.* at 2341. This Court, however, has never precisely articulated "the character of the standard that will identify unconstitutionally excessive awards." *Id.* at 2335.

Earlier this year, the Court granted certiorari in *BMW of North America, Inc.* v. *Gore*, 644 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (No. 94-896), in which the standard for constitutional excessiveness review is at issue. In *BMW*, an Alabama jury assessed $4,000,000 in punitive damages against an automobile manufacturer because of its failure to disclose to a car buyer that the car was partially refinished. *See* 646 So. 2d at 627. The

Supreme Court of Alabama determined that remittitur of the punitive damage award to $2,000,000 would be appropriate. *Id.* at 629. In *BMW*, this Court has agreed to review two questions, the second of which is "[w]hether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment." Petition for Certiorari at I, in *BMW of N. Am., Inc.* v. *Gore*, No. 94-896.

The question presented in the instant case is substantially similar to the second question presented in *BMW*. Thus, both the case at bar and *BMW* present this Court with the opportunity to provide meaningful guidance regarding the standard that should be applied in determining whether a punitive damage award is grossly excessive in violation of due process. The similarity of the question presented here and the second question presented in *BMW* suggests that the Court would hold this petition until *BMW* has been decided and then grant certiorari in this case and remand for appropriate disposition in light of the Court's decision in *BMW* on the excessiveness issue.[3]

In *BMW*, the petitioner argues on the merits that federal due process requires: (1) close proportionality between the harm caused—as measured by actual damages—and the punitive damage award; (2) that punitive damages must not be disproportionate to the severity of the misconduct; and (3) that punitive damage awards must bear a reasonable

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[3]It is generally recognized that "[w]here the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision." R. Stern, *et al., Supreme Court Practice* § 4.16, at 192-93 (7th ed. 1993).

relationship to civil fines imposed for similar conduct by the pertinent jurisdiction. Opening Brief of Petitioner, at 32-51, in *BMW*. If this Court accords constitutional significance to any or all of these factors, or to other factors that the Court may identify in deciding *BMW*, then it is plain that petitioners' federal due process challenge to the punitive damage awards at issue here would, at the very least, have to be reconsidered by the Tenth Circuit in light of *BMW* unless this Court were otherwise to grant plenary review of this case.

II. IF THE COURT DOES NOT DECIDE THE EXCESSIVENESS QUESTION IN *BMW*, THE INSTANT CASE PRESENTS AN APPROPRIATE OPPORTUNITY FOR THE COURT TO DECIDE THIS IMPORTANT AND RECURRING ISSUE

If this Court does not reach or fully address the excessiveness issue in *BMW*, this case provides an appropriate vehicle for articulating the due process standards for excessiveness review of punitive damages.[4] Guidance from the Court in this area is sorely needed, as lower courts are being called upon with increasing frequency to review punitive damage awards and such awards are now commonly imposed in staggering amounts

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[4]The instant case illustrates the danger of excessive damages that courts have long recognized to exist in malicious prosecution cases. As this Court observed in *Honda*, by the early nineteenth century, it was "'well acknowledged in all the Courts of *Westminster-hall*, that whether in actions for criminal conversion, **malicious prosecutions**, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury.'" *Honda*, 114 S. Ct. at 2336 (quoting *Hewlett* v. *Cruchley*, 5 Taunt. 277, 281, 128 Eng. Rep. 696, 698 (C.P. 1813)) (emphasis added). And, in what is believed to be the first federal court decision ordering remittitur of punitive damages, Justice Story determined that exemplary damages on a malicious civil prosecution claim were excessive. *See Blunt* v. *Little*, 3 F. Cas. 760 (C.C. Mass. 1822) (No. 1,578).

that bear no reasonable relationship to the conduct being punished. *See, e.g.*, Petition for Certiorari in *BMW*, at 26-29; Brief *Amici Curiae* of Life Ins. Co. of Ga., *et al.*, in *BMW*, at 14-21, App. A-C.

The instant case is a remarkable example of this phenomenon. Petitioners' conduct resulted in no physical injury to plaintiff or anyone else. Although the jury awarded respondent "general damages" of $284,000, his out-of-pocket loss was no more than approximately $34,000 in legal fees, and his other "injuries," according to his own testimony, consisted primarily of lost time that he could have been spent in developing a business opportunity that he heard about (a new golf course). These "harms" to respondent, if they can be characterized as such, certainly do not justify the $2,250,000 punitive damage award at issue.

Nor can the size of the punitive exaction be justified by any arguable potential harm from the petitioners' conduct. The District Court concluded that the predicate lawsuits "were contrived to succeed by destroying the familial status of plaintiff, and thereby bring him to his knees," App. 12a, 14a, 25a, and that "[p]laintiff alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, [and] destroy his perceived position in the family." App. 12a, 14a, 21a. Accepting this view of the evidence, however, it is difficult to imagine how a family dispute apparently motivated by sibling rivalry can justify a punitive damage award of the magnitude imposed here, especially considering the relatively small amount of money that respondent actually spent in litigating the predicate cases at issue.

The amount of punitive damages awarded to respondent is particularly troubling in that the $2,250,000 award easily dwarfs the size of punitive damages awarded in every other reported malicious prosecution case decided under

Oklahoma law.[5] For example, in *Moore* v. *Target Stores, Inc.*, 571 P.2d 1236 (Okla. 1977), the plaintiff was awarded only $35,000 in punitive damages on claims of malicious prosecution and false arrest resulting from her having been falsely accused and actually arrested on charges of shoplifting. The conduct of petitioners alleged in the case at bar pales in comparison to the conduct at issue in *Moore*, yet the punishment imposed on petitioner is more than sixty times greater. And, in *Kitchens* v. *Bryan County National Bank*, 825 F.2d 248 (10th Cir. 1987), the plaintiff recovered only $60,000 in punitive and compensatory damages on a malicious prosecution claim against a bank after the plaintiff had prevailed on criminal theft charges brought by the district attorney as a result of false accusations against the plaintiff made by the bank's president.[6] The limited size of punitive damage awards in these Oklahoma malicious prosecution cases undoubtedly reflects the hostility towards this tort under Oklahoma law. *See, e.g.*, App. 51a ("malicious prosecution is a tort disfavored by our jurisprudence"); *Glasgow* v. *Fox*, 757 P.2d 836, 838 (Okla. 1988) ("malicious prosecution actions are not favored and should not be encouraged by lax rules favoring them"); *Young* v. *First State Bank, Watonga*, 628 P.2d 707, 709 (Okla. 1981) (same).

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[5]Petitioners have located no reported case decided under Oklahoma law in which punitive damages were awarded for an abuse-of-process claim.

[6]The punitive exaction against petitioners also easily surpasses the amount of punitive damages awarded in virtually every reported malicious prosecution case decided in other jurisdictions. *See, e.g.*, *Lipari* v. *Volume Shoe Corp.*, 664 S.W.2d 953 (Mo. Ct. App. 1983) (customer acquitted of criminal charges of shoplifting was awarded $13,000 in actual damages and $74,000 in punitive damages against the store); *Eans* v. *Grocer Supply Co.*, 580 S.W.2d 17 (Tex. Ct. App. 1979) (employee acquitted of misdemeanor theft charge instigated by employer was awarded $70,000 in actual damages and $5,000 in punitive damages).

Also, the $2,250,000 punitive damage award far exceeds the maximum criminal fines for criminal conduct most analagous to malicious prosecution and abuse of process. Common barratry—defined as "the practice of existing groundless judicial proceedings," Okla. Stat. Ann. tit. 21, § 550 (West 1983), "in at least three instances, and with a corrupt or malicious intent to vex and annoy," Okla. Stat. Ann. tit. 21, § 552—is a misdemeanor carrying a maximum fine of $500, Okla. Stat. Ann. tit. 21, §§ 10, 551. Similarly, the maximum criminal fine is $500 for the misdemeanor of maliciously instituting or prosecuting any action or legal proceeding or making or procuring any arrest in a false name. *See* Okla. Stat. Ann. tit. 21 §§ 10, 584.[7]

Moreover, and as recognized by the court below, punitive damages were awarded in this case for conduct never previously recognized as tortious under Oklahoma law. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), this Court recognized that retroactive imposition of punitive damages based on a new common-law cause of action would "raise important [constitutional] issues which, in an appropriate setting, must be resolved." *Id.* at 828-29. Two Terms ago, the Court similarly observed that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf* v. *USI Film Prods.* 114 S. Ct. 1483, 1505 (1994); *see also Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 489 (1915) (due process violated where punitive damages were imposed based upon new judicial construction of a statute statute and "[t]here had been no decision in the state holding or indicating that" the defendant's conduct was unlawful). The same constitutional concerns arise here, as well as the substantial question whether the federal courts

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[7]Although a maximum one-year term of imprisonment may also be imposed for the above-described misdemeanors, Okla. Stat. Ann. tit. 21, § 10, petitioners have located no reported Oklahoma decision in which any imprisonment was imposed for these misdemeanors.

below, consistently with their obligations under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1939), properly upheld what is by far the largest punitive damage award in any malicious prosecution or abuse-of-process case decided under Oklahoma law.

Finally, the size of the punitive damage award cannot be justified in light of petitioners' wealth. Although respondent asserted at trial that petitioners' net worth was $25 million, petitioners' net worth stood as determined by CPAs and legal advisers at $7,352,339, as of the time of their application for a supersedeas bond. The $2,250,000 punitive damage award is almost *one-third* of the latter figure—a percentage that far surpasses the percentage of the defendant's net worth represented by the punitive damage award in virtually every other punitive damage case. *See, e.g., Spaeth v. Union Oil Co. of Calif.*, 762 F.2d 865, 866-67 (10th Cir. 1985) (affirming remittitur of punitive damage award from $3 million to $2 million against a defendant with $3.3 *billion* net worth), *cert. denied*, 476 U.S. 1104 (1986).

In sum, this case presents an example of a punitive damage system that is out of control. Something is wrong with a system that permits an individual plaintiff to obtain a $2,250,000 punitive exaction against his own sister and brother-in-law, taking away almost one-third of their wealth, where the plaintiff suffered no physical injury, was never falsely arrested, had a pecuniary loss of only $34,000, and the underlying conduct had never previously been declared unlawful or been deemed punishable in such a large amount by the jurisdiction providing the substantive law governing the rights and obligations of the litigants. This case provides an excellent vehicle for the Court to articulate the standards for due process review of the excessiveness of punitive damages in a context where such guidance is truly needed.

CONCLUSION

For the foregoing reasons, certiorari and plenary review should be granted in this case to address the important issue of the standards to be applied by federal courts in

conducting due process review of punitive damages awards for excessiveness. In the alternative, the Court should retain the case on its docket and dispose of the case appropriately in light of its decision in *BMW of North America, Inc.* v. *Gore*.

September 14, 1995 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT I. GREENBERG,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 92-6023
v.	)	(D.C. No. CIV-90-1302-A)
	)	(W.D. Okla.)
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before TACHA, SETH, and BALDOCK, Circuit Judges.

The Appellee herein, Robert Greenberg, brought suit under Oklahoma law against the Appellants Laurance B. Wolfberg and Carolyn Wolfberg asserting causes of action for malicious prosecution and abuse of process. The Complaint was based on a series of lawsuits brought against Greenberg personally, or against his interests, by the Appellants, the Wolfbergs, beginning on November 3, 1986 and continuing into 1990.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

The jury returned a general damages verdict against the defendants in the amount of $284,000. The jury heard evidence as to the financial position of both defendants and awarded punitive damages of $1,750,000 against Laurance Wolfberg and $500,000 against Carolyn Wolfberg. The court denied the post-trial motions of defendants. Defendants appealed.

This court certified several questions raised in this appeal to the Supreme Court of Oklahoma. The response of that court as to the applicable law of Oklahoma was most helpful.

Robert Greenberg and Carolyn Wolfberg are the children of Mal Greenberg and Rose Greenberg. Laurance Wolfberg is married to Carolyn Greenberg Wolfberg. Robert Greenberg and Laurance Wolfberg over several years had jointly held interests in several businesses. Mal Greenberg left a testamentary trust for the benefit of his children and his wife, Rose Greenberg. On the death of Rose the trust estate was to be divided. Robert Greenberg was to receive his portion outright, but Carolyn's share was to remain in trust. Robert Greenberg was named a trustee of the testamentary trust and the continuing trust for Carolyn. Much of the litigation which is here relates to this trust following Mal Greenberg's death.

Sometime in 1982 Robert Greenberg and Laurance Wolfberg agreed to separate their joint interests. This included their interests in Service Business Forms. By the division, Wolfberg was to receive all the shares in Service except those shares held by the Mal Greenberg Testamentary Trust. They were so sold and Service executed a note to the trust for the purchase price ($100,000). Wolfberg thus acquired control of all the shares of Service. This note became the subject of some of the continuing litigation.

The joint interests in an oil well service company, Griffith Resources, were to be separated. However, Griffith owed a bank loan and the bank had made a demand for payment. Greenberg and Wolfberg agreed to pay a share of this loan ($400,000) by having Green Wolf Oil

Company (another jointly owned enterprise) loan the money to Griffith Resources. This was done.

The case before us, both the malicious prosecution cause of action and the abuse of process cause, are based on several predicate cases brought against Greenberg, or his interests, by the defendants herein, as mentioned. The several cases are described below. Some detail appears to be necessary to explain the interrelation among the cases.

Case No. 1. The first predicate case was filed in the United States District Court for the Western District of Oklahoma on November 3, 1986 (CIV-81-2441-C). It was titled Laurance Wolfberg v. Robert Greenberg. One count asked for an audit of the Green Wolf Partnership accounts which was granted by the court. Wolfberg also asserted that the fee charged by Greenberg to manage the partnership was excessive. A refund of profits was requested. There was also a claim that Greenberg used borrowed money for his own account which belonged to the partnership, but this was abandoned before trial.

There was also an attempt in the suit to hold Greenberg responsible for the $400,000 loan to Griffith Enterprises. Punitive damages of one million dollars were sought.

The trial court granted the audit, as mentioned, but denied all other claims for breach of duty. As to the Griffith note, the trial court characterized Wolfberg's testimony as incredible and unbelievable and this "tainted his credibility with respect to every other issue."

The trial court's decision was appealed by Wolfberg, affirmed May 1989, and rehearing by the court of appeals was denied. Wolfberg sought certiorari from the United States Supreme Court. This was denied November 13, 1989.

Case No. 2 was filed November 26, 1986 in the state court, the District Court for Oklahoma County, Oklahoma (No. CJ-86-12606). Plaintiffs were the Wolfbergs and Service Business Forms. Greenberg was a defendant (with others) individually and as trustee. Damages were sought

for breach of contract ($300,000), a fraud claim against Greenberg, and punitive damages ($1,000,000). Apparently the plaintiffs sought to force a counterclaim by the trust on the Service note or to have the trust disclaim the right to proceeds of the note. It was asserted that Greenberg had agreed to do so. However, the plaintiffs voluntarily dismissed without prejudice this Suit No. 2 (March 18, 1988). The case had been pending about a year and four months.

Case No. 3 was filed December 3, 1966, in the District Court, Oklahoma County, Oklahoma, No. CJ-86-12734, Carolyn Wolfberg v. Robert Greenberg. trustee, and individually. It was also against all other trustees of Greenberg Trust and asked for an accounting, removal of trustees, dissolution of the trust and distribution of property. Damages were sought against Greenberg for breach of fiduciary duty and costs. Punitive damages were claimed in the amount of $10,000,000.

The court permitted an audit but no wrongdoing was found by the audit. A hearing was set on the summary judgment motion of the defendants in Case No. 3 for September 18, 1987, but the plaintiffs dismissed without prejudice on the day before the hearing date. The plaintiffs, however, persisted in basically the same claim, and so filed another suit in a Kansas state court (this is Case No. 4).

Case No. 4, District Court, Sedgwick County, Kansas, No. 88-C-3346, was filed September 16, 1988, and terminated February 15, 1990. In this Kansas case, which followed the voluntary dismissal of No. 3, Mrs. Wolfberg as the plaintiff sought the removal of trustees for hostility, but no damages were sought. No hostility by the trustees was found, but the court found that what hostility might exist was by Laurance Wolfberg toward his brother-in-law. The Kansas court held for Robert Greenberg, one of the named defendant-trustees.

The trial judge in No. 4 stated as to the hostility of Mr. Wolfberg that it "has been precipitated by Mr. Wolfberg's

mental illness, and which hostility has been apparently adopted by Mrs. Wolfberg." Appellant's App. at 298.

Case No. 5 was filed December 9, 1986 in the United States District Court for the Western District of Oklahoma by Greenberg as a co-trustee of the testamentary trust and by the other trustees to collect from Service Business Forms on the note described above. In this action Service Business Forms (then controlled by Wolfberg) asserted by a counterclaim served March 1987 basically the same cause advanced in Case No. 2. Thus it sought to avoid the note it had signed. The court granted summary judgment March 17, 1988 on the note against Service. An advisory jury found no agreement by Greenberg to file a disclaimer as to the note. Final judgment was entered for plaintiffs on March 14, 1988.

In No. 5, an appeal by Service was taken on the summary judgment. The court of appeals affirmed. A Petition for Certiorari was filed in the United States Supreme Court and denied on January 16, 1990.

A counterclaim is a "civil proceeding" for the purposes here considered. RESTATEMENT (SECOND) OF TORTS § 674.

Malicious Prosecution

There is nothing unusual about the cause of action for malicious prosecution under Oklahoma law. The Oklahoma Supreme Court in its response to our certification and in Young v. First State Bank, Watonga, 628 P.2d 707 (Okla.), set forth the elements. Thus the plaintiff in the malicious prosecution case must prove that the defendant:

1. initiated the proceedings, and each, if several proceedings are asserted as the predicate;

2. that the proceedings were motivated by malice, were without probable cause, and damaged plaintiffs;

3. that the proceedings (or separate causes within the proceedings) were concluded in plaintiffs' favor.

Oklahoma generally cites the RESTATEMENT (SECOND) OF TORTS (1977), and it at § 679 states in part as to malicious prosecution:

> "One who repeatedly initiates civil proceedings against another for the same cause of action is subject to liability for the harm caused thereby, if
>
> "(a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and
>
> "(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought."

Use of Multiple Predicate Suits

There is apparently no Oklahoma case law on a malicious prosecution action grounded on repetitive civil proceedings. In our view, the above quoted provisions would apply. To use such a predicate, the same basic cause of action should appear in each earlier component, and the elements stated above should be present in each of the earlier components. Each case must be separately evaluated as a condition to the use of an earlier adversely decided component as an element of proof in a later one.

Abuse of Process

Under Oklahoma law the elements of the tort of "abuse of process" are:

1. a misuse of process or misapplying it for a purpose for which it was not "designed" to accomplish;

2. use of process primarily for an improper purpose;

3. with damage to the plaintiff.

See Oklahoma Supreme Court Response, and PROSSER AND KEATON ON THE LAW OF TORTS, § 121, at 897 (5th Ed.).

When examining predicate cases it must of course be determined whether the process was wrongfully used. If in earlier proceedings there is proof of facts relevant to the motive in a later action, such facts may be used.

To repeat, the Oklahoma Supreme Court in its response to our certified questions, described the abuse of process cause of action's elements in Oklahoma:

> "The tort's elements are (1) the improper use of the court's process (2) *primarily* for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse. Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse if the court's process is used legitimately to its *authorized* conclusion."

(Footnotes omitted.) The Oklahoma Supreme Court also stated that the plaintiff in an abuse of process action is not required to prove that:

> (l) the underlying action was brought *without probable* cause or (2) that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded."

The Oklahoma Supreme Court also points out that the term "process" includes "the entire range of procedures incident to the litigation process," citing Nienstedt v. Wetzel, 651 P.2d 876 (Ariz.)

The elements of the tort of abuse of process, the factors, and their interaction are quite different from those in malicious prosecution proceedings. It is apparent that we are concerned only with the misuse of "process," and not with the commencement of actions. Thus the purpose

and authorized use of process for its accepted purpose, and to pursue it to a conclusion, although carried out with bad intentions, is not an abuse of process.

It is sufficient to refer to the response of the Oklahoma Supreme Court to our certification, and to Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379 (10th Cir.), and Gore v. Taylor, 792 P.2d 432 (Okla. Ct. App.).

Post-Trial Motions

After a seven-day trial and the jury verdict the defendants moved for a Judgment N.O.V., and also for a new trial (or for a remittitur of damages). The trial judge in his Order which denied the motions necessarily included an examination of the evidence as we must do to see whether the jury could properly have decided as it did. Sandlin v. Texaco, 900 F.2d 1479 (10th Cir.); Brown v. McGraw Edison Co., 736 F.2d 609 (10th Cir.). Also the court considered the challenge as to whether Oklahoma law was followed.

The Oklahoma case law as described above is quite clear that a predicate suit must be "terminated" in favor of the malicious prosecution plaintiff before a malicious prosecution case can be based on it in the ordinary situation. The very good reason stated for the requirement is that, as the Oklahoma Supreme Court said in the response to certification, "[t]o hold differently would be to countenance the possibility of countervailing results arising from the same action." But what should be the conclusion if this possibility cannot exist, thus, if the reason for the rule does not exist? In the case before us there exist some very unusual circumstances relating to this point, and these demonstrate that there can be no "countervailing" action.

As described, Case No. 2 was an action by Service Business Forms and the Wolfbergs filed November 26, 1986 in the Oklahoma state court as one of the three original cases filed in the first month. It concerned the note of Service given to the trust. This case was pending for about a year and four months and then dismissed without prejudice by Service Business Forms. When the case was

so dismissed Service Business Forms' counterclaim had been pending in the United States District Court of Oklahoma in Case No. 5 for about a year. This counterclaim raised the same issues on the note due the trust as were raised in Case No. 2. The counterclaim was filed in No. 5 which was a case filed by the trustees to collect on the note of Service. This issue on the note was decided in favor of the trustees in No. 5. Service Business Forms-Wolfbergs sought certiorari from the United States Supreme Court. This was denied in 1990. This would seem to have precluded a "countervailing" result on the issue in the voluntarily dismissed case. The issue was "concluded" favorably to Greenberg.

Considering dismissals we have also Case No. 3, one of the three original cases. It was filed on December 3, 1986 in the Oklahoma County state court by Mrs. Wolfberg against Greenberg and others. It sought removal of the trustees and $10,000,000 in damages. A preliminary audit developed nothing and the case was dismissed without prejudice the day before a hearing was to be held on the Greenbergs' summary judgment motion directed to the trustee removal issue.

Further, as to the dismissed Case No. 3, the same cause of action was begun by Mrs. Wolfberg in a Kansas state court. Again, this was for the removal of the trustees. This is Case No. 4 filed in September of 1988. This Kansas case was terminated in Greenberg's and the trustees' favor by a judgment on the removal issue. Thus the basic issue in Case No. 3 was raised by the Wolfbergs and litigated to a conclusion albeit in another court in Case No. 4, a conclusion favorable to Greenberg. As a consequence no "countervailing results" could arise from No. 3. The reason for "the Rule," not to consider dismissed actions, does not exist.

It seems reasonable under these very unusual circumstances described above that we must consider both of the cases voluntarily dismissed on the malicious prosecution and the abuse of process issues because there is not prevailing authority not to do so. The blanket exclusion of all cases voluntarily dismissed is not applicable.

As to the timing of the five cases, the record shows that in the last month of 1986 there were three cases pending; during most of 1987 there were four cases pending; during 1988 three cases were pending (except from March to September when two were pending); and in 1989 there were three cases which lasted into the first part of 1990.

Schedule of Cases

Case No.	1986	1987	1988	1989	1990
#1 Filed Nov. 3, 1986	U.S.D.C. W.D. Okla.	----------	----------	Cert. Denied Nov. 13, 1989	
#2 Filed Nov. 26, 1986	State Ct. Okla. Cty	----------	Dismissed March 18, 1988		
#3 Filed Dec. 3, 1986	State Ct. Okla. Cty.	Dismissed Sept. 18, 1987			
#4 Filed Sept. 16, 1988			State Ct. Kansas 1988	----------	Judgment Feb. 15, 1990
#5 Filed Dec. 9, 1986 (by the Trust)	U.S.D.C. W.D. Okla.	Counterclaim filed March 1987	----------	----------	Cert. Denied Jan. 16, 1990

Consideration of the "issue relationship" of the several cases in different courts and different states, together with the commencement by the Wolfbergs of three cases at the outset in about a thirty-day period, in a federal court and a state court, must have led the trial court to the conclusions and findings it expressed. These statements by the trial court were included in the trial transcript, but perhaps of more significance are those in its order of denial entered in response to the Motion of Judgment N.O.V. filed by the Wolfbergs which raised the issues which the court related to the evidence as well as to the law.

The Motion for Judgment N.O.V. by the Wolfbergs argues that the jury verdict is against the clear weight of the evidence, and that the law applied was contrary to that prevailing in Oklahoma. As mentioned, the trial court denied defendants' motions and also stated some conclusions in its ruling as to all the actions. Thus in part the court found, at page 6:

> "Defendant, Lawrence B, Wolfberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees."

And in the Order the trial court also stated:

> "Plaintiff alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, destroy his perceived position in the family
> . . . .

The court's reference to bringing Greenberg "to his knees" is from Plaintiff's Exhibit 44, a letter from Wolfberg to an attorney relative to action against the trust.

The court also apparently relied on Plaintiff's Exhibit 60, a letter wherein Wolfberg insisted in August 1989 that certiorari be sought in Case No. 1 by stating "based on business and overall legal strategy, this effort should be

made." The attorney had recommended that certiorari not be sought.

The trial court commented on the third suit brought by these defendants in its Order at page 6:

> "The court notes that the management of the third lawsuit in Oklahoma County was particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis. Defendants' tactic was to continually extend and delay the proceeding at the expense of all the parties involved. Once defendants faced a firm Oklahoma County hearing date on the now-plaintiff's motion for summary judgment, defendants chose to dismiss the suit the day before the scheduled meeting. Shortly thereafter, defendants refiled the same action in District Court of Kansas."

The trial court found:

> "The Court adds that there was no evidence that the current plaintiff, Robert I. Greenberg, had not been sued in his personal capacity throughout all the subject lawsuits."

We agree with this finding since all the suits were directed to him personally and to his position or interests.

Conclusion on Principal Issues

We do not adopt the trial court's position that it was a "unitary action" for all purposes. However, it is apparent that the same purposes, intent, and wilful acts by the defendants herein were applicable and controlled the bringing, timing, and the pursuit of all the predicate suits. The dismissal of suits with the repetition of issues in new filings appears to be an attempt to avoid the traditional abuse of process doctrines, but in our view had the opposite effect, as did the use of different jurisdictions. The process was used for "an ulterior or improper motive" causing damage to this plaintiff in each instance.

In this conclusion it is not necessary to again describe the evidence as it has been referred to and quoted above as it relates to both causes of action. This pervaded the series of cases. We have described the "issue relationship" of the several cases, and noted the sequence, the number of cases pending at any one time, and the time span from the end of 1986 to the first part of 1990. Further, we agree with the trial court's determination that the cases were not commenced by defendants nor conducted by them for any proper purpose. As the trial court determined, and we again quote:

> "Defendant, Lawrence B. Wolfberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees."

When the predicate suits are each separately examined as Oklahoma law directs, with the inclusion of the specific and above overall and continuing actions, intent, and purpose of the defendants in each case, the conclusion must be reached that all the elements of both abuse of process and of malicious prosecution as hereinabove described have been established.

Other Issues

Defendants seek a new trial based on an asserted trial error. Mrs. Wolfberg testified at trial that she had not asked her brother (Greenberg), as a trustee of the trust described above, for money from the trust. She was questioned regarding a statement made in a deposition which may have been to the contrary, but she testified that she did not ask her brother.

The trial court's ruling in question however came during the testimony of one of Mrs. Wolfberg's attorneys. He was asked about an answer to an interrogatory he had prepared for Mrs. Wolfberg in Case No. 3 and signed by her. This answer stated that she had asked her brother for money from the trust. The contradiction was raised during

the questioning of Mrs. Wolfberg's attorneys (as mentioned). The trial judge stopped the testimony of the attorney, pointed out the testimony of Mrs. Wolfberg that she had never asked, and stated that if Mrs. Wolfberg's testimony at the trial in progress was that she had not asked for money then it was a "judicial admission" that is conclusively established. The court admonished the jury:

> "[A] party litigant may not advance a contention in trial which is inconsistent with her testimony at that trial. The testimony at trial constitutes what's known in law as a judicial admission, by which a party is bound . . . . I advise you that Mrs. Wolfberg may not advance any contention in this case to the effect that she ever asked Robert I. Greenberg, as trustee, for the disbursement of any money to her."

The judge thus held that the defendants could not advance the "contention" that Mrs. Wolfberg had asked for money. All parties and the trial judge in his order on the post-judgment motions agree that this characterization of the statement of Mrs. Wolfberg was not correct.

Further as to the ruling, no evidence was advanced that Mrs. Wolfberg needed an emergency advance from the trust. The evidence showed she had a substantial balance in her bank account ($80,000.00), and was receiving a monthly advance.

The ruling, of course, prevented her from taking the position that she had asked for money but the record shows this was not significant. She had acknowledged the facts on which the court ruled, and the consequence of the ruling was not significant under the circumstances. The ruling was directed to the jury as a legal rule or procedural rule and was not presented, as Appellants urge at length, as an opinion as to Mrs. Wolfberg's veracity. We must conclude that the error was harmless. See Kotteakos v. United States, 328 U.S. 750, 776 (error is harmless where it does not have a "substantial and injurious effect" on the outcome).

Limitations

Malicious Prosecution

The Oklahoma statutes expressly provide that the period of limitation for an "action" for malicious prosecution is a year. 12 O.S. § 95 (1991). This is within one year "after the cause of action shall have accrued." § 95. Rutherford v. Halliburton Co., 572 P.2d 966 (Okla.).

A cause of action in Oklahoma accrues when a plaintiff could have first successfully maintained the cause. Each predicate is considered. The period of limitations does not start to run until the predicate case is no longer pending or the time for appeal has expired. Coleman v. Strong, 232 P. 378 (Okla.)

This action was filed on August 14, 1090. As shown below, this is within one year of the termination of each predicate action.

Limitations

Abuse of Process

The Oklahoma statutes make no specific provisions for a period of limitations for abuse of process actions. The Oklahoma Supreme Court in its response to our questions has stated that it must be placed in the two year period of 12 O.S. § 95(3) (1991) for those actions "not enumerated."

The cause of action arises-accrues, the court says, "when the process is abused and damages are incurred, *regardless of when the action is determined.*" The court also stated:

> "The court may find earlier components of the Process [as defined by the certifying court] relevant as proof of an ulterior or improper motive in a subsequent action."

The record shows, as hereinabove mentioned, the predicate actions:

No. 2-4 - terminated Kansas state court February 15, 1990.

No. 1 - certiorari denied November 13, 1989.

No. 3-5 (counterclaim), certiorari denied January 16, 1990.

We must hold that the action before us was commenced, as to both causes, within the Oklahoma limitations periods.

Other Issues

The Appellants urge that as to the abuse of process issue in this case the evidence did not show "wilful acts," nor did the pleading make such an assertion. In our view, there was adequate evidence of "wilful acts" -- acts not authorized by "the process." There was adequate evidence of this element. Meyers v. Ideal Basic Industries, Inc., 940 F.2d 1379 (10th Cir.); Gore v. Taylor, 792 P.2d 432 (Okla. Ct. App.); Neil v. Pennsylvania Life Ins. Co., 474 P.2d 961 (Okla.).

We have considered above the trial ruling as to testimony of Mrs. Wolfberg which characterized for the jury some as a "judicial admission." This was incorrect, as the trial court later acknowledged. This error was not significant, did not demean her, and is not ground for reversal.

The award of punitive damages is challenged as excessive considering the defendants' net worth. We do not find in the record a basis for this argument of defendants. The Oklahoma statute does not violate due process as the Appellants urge. We have considered the statute or a similar statute in prior cases. See John A. Henry & Co. Ltd. v. T.G.&Y. Stores Co., 941 F.2d 1068 (10th Cir.), and Silkwood v. Kerr-McGee, 769 F.2d 1451 (10th Cir.). The evidence to support the general damages verdict was sufficient considering the time, litigation involved, and the evidence that plaintiff was unable to properly take care of his business and had emotional problems resulting from the ongoing litigation.

The judgment of the United States District Court for the Western district of Oklahoma herein appealed from is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROBERT I. GREENBERG,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 92-6023
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants-Appellants.	)	

ORDER
Entered June 16, 1993

Before TACHA, SETH, and BALDOCK, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

rehearing in banc, Rule 35, Federal Rule of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

/s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT I. GREENBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-90-1302-A
	)	
LAURENCE B. WOLFBERG and CAROLYN WOLFBERG,	)	
	)	
Defendants.	)	

ORDER

Before the Court are Defendants' Motion For Judgment Notwithstanding The Verdict, Or For, Certification To The Oklahoma Supreme Court; and Motion For A New Trial, Or For, A Remittitur Of Damages. The Court tried this case to a jury in seven days of exhausting testimony and exhibits. After conscientious deliberations, the jury returned a verdict for plaintiff, Robert Greenberg, on the grounds of malicious prosecution and abuse of process.

Plaintiff, Robert I. Greenberg, was successful in proving that over a four year period, defendants maintained a series of damaging lawsuits against plaintiff. Plaintiff's [sic] alleged and succeeded in proving that defendants' overall strategy was to financially break plaintiff, destroy his perceived position in the family, acquire business property at reduced prices, avoid payment on a trust note, obtain release of trust shares, force the resignation of the trustees of Mal Greenberg's estate, and force plaintiff to relinquish any benefits he may receive from payment of the note to the trust. Plaintiff was successful in persuading the jury that this series of actions together constituted a malicious prosecution and abuse of process claims.

Defendants, Laurance B. Wolfberg and Carolyn Wolfberg (hereinafter "the Wolfbergs"), move for

judgment notwithstanding the verdict (hereinafter "JNOV") in their favor. Defendants allege that there was insufficient evidence presented at trial for the jury to find in plaintiff's favor. In the alternative, the Wolfbergs move the Court to certify two legal questions to the Oklahoma Supreme Court for an advisory opinion, pursuant to Okla. Stat. tit. 20 § 1601 et seq. In separate motions defendants' [sic] move for an order granting a new trial on the grounds that the Court committed clear error, or in the alternative, for the Court to order a remittitur of damages awarded by the jury.

STANDARDS FOR MOTIONS JNOV AND NEW TRIAL

"Motions for a directed verdict and for JNOV are considered under the same standard." Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 498 (10th Cir. 1984). The standard was summarized by the Tenth Circuit in Rajala v. Allied Corp., 919 F.2d 610 (10th Cir. 1990), cert. denied, 111 S. Ct. 1685 (1991). The test is whether there is sufficient evidence presented at trial for the jury to properly return a verdict for the party opposing the motion for directed verdict. Id. at 615. In making that determination the court "may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury," but rather "must view the evidence most favorably to the . . . [nonmoving] party and give that party the benefit of all reasonable inferences from the evidence." Brown v. McGraw-Edison Co., 736 F.2d 609, 613 (10th Cir. 1984); accord, Sandlin v. Texaco Ref. & Mktg., Inc., 900 F.2d 1479, 1483 n.5 (10th Cir.), cert. denied, 111 S. Ct. 252 (1990).

As a condition precedent to a motion JNOV, a motion for directed verdict must be made at the close of all the evidence. United States ex rel. Roger IBG v. Reisz, 718 F.2d 1004, 1007 (11th Cir. 1983); Special Promotions, Inc. v Southwest Photos, Ltd., 559 F.2d 430, 432 (5th Cir. 1977); Fed. R. Civ. P. 50(b) advisory committee's note ("A motion for judgment notwithstanding the verdict will

not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.").[1]

In ruling on a motion for new trial, the Court may only set aside the jury's verdict when it concludes the verdict was against the great weight of the evidence or when prejudicial error has been entered into the record. McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990). A "jury verdict must not be preempted unless it has no basis in fact." United States v. Fenix & Scisson, Inc., 360 F.2d at 262. Moreover, the mere fact that the jury could have drawn different inferences or conclusions, or the fact that the Court believes that another result is more reasonable is no basis for granting a new trial. Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 186 (8th Cir. 1972) (citing Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944)), cert. denied, 410 U.S. 930 (1973).

The district court's ruling on a motion for directed verdict or for JNOV is reviewed de novo by the Tenth Circuit, applying the same standard as that used by the district court of the first instance. Rajala v. Allied Corp., 919 F.2d at 615; Sandlin v. Texaco Ref. & Mktg., Inc., 900 F.2d at 1483 n.5; Brown v. McGraw-Edison Co., 736 F.2d at 613. The district court's ruling on either a motion for directed verdict, or for, JNOV is reviewed de novo by the appellate court, and a ruling on a motion for new trial is reviewed for manifest abuse of discretion. These two appellate standards were clearly delineated by Chief Judge Holloway in Brown v. McGraw-Edison Co., 736 F.2d at 609, and have frequently been restated. See N. Simmons, Tenth Circuit Court of Appeals Desk Book: Standards of Appellate Review at 27-28 (1988).

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[1]The record reflects that a motion for a directed verdict was entered by defendants [sic] counsel at the close of all evidence.

MOTION FOR JNOV

Defendants state that the Court should enter JNOV in their favor because the jury's verdict, consisting of malicious prosecution and abuse of process findings, cannot stand because it is against the clear weight of the evidence. Defendants' arguments in support of their motion for JNOV are strikingly similar to those made to the Court in a motion for summary judgment.[2] In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), the Supreme Court stated that the standard for motions JNOV and new trial mirrors that of summary judgment. The 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made after all the evidence that has been admitted. Id. None of the evidence presented during this trial would tend to overcome the Court's previous ruling, so the Court stands by its June 3, 1991, Order denying summary judgment on this same issue. The Court adds that there was substantial evidence presented at trial for the jury to properly return a verdict for plaintiff.

Defendants' [sic] also assert that the abuse of process judgment is time barred. Upon review of the arguments presented in this motion, the Court reiterates its position that these lawsuits are to be viewed as a whole, rather than as discrete lawsuits. Under this assumption, the statute begins to run with the termination of the fifth lawsuit. The November 13, 1989, denial of the writ of certiorari on the fifth lawsuit constituted an appeal of the Tenth Circuit's decision by defendants. The application for the writ of certiorari by defendants prevented the statute from beginning to toll, so the complaint in this case is timely.

---

[2]At issue in the June 3, 1991, summary judgment order, was the cause of action for malicious prosecution alone, and not abuse of process.

Defendants are estopped from seeking to avoid the consequences of their decision to vigorously pursue their Supreme Court appeal, in spite of the fact that it has created the unintended result of tolling the time bar.

Defendant, Lawrence B. Wolberg, brought these lawsuits on with self declaration of unitary action. The lawsuits pursued by defendants were not sought to vindicate rights, but were contrived to succeed by destroying the familial status of plaintiff, and thereby bringing him to his knees. The voluntary dismissal of the third lawsuit filed, on December 3, 1986, in the District Court of Oklahoma County does not provide defendants with a defense in this present action because subsequent to its dismissal defendants refiled and lost the same lawsuit in the Eighteenth Judicial District, District Court of Sedgwick County, Kansas.

The Court notes that the management of the third lawsuit in Oklahoma County was particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis. Defendants' tactic was to continually extend and delay the proceeding at the expense of all the parties involved. Once defendants faced a firm Oklahoma County hearing date on the now-plaintiff's motion for summary judgment, defendants chose to dismiss the suit the day before the scheduled meeting. Shortly thereafter, defendants refiled the same action in District Court of Kansas. If this type of conduct lies outside any tort remedy, there would be an intolerable lacuna in favor of malicious prosecution litigants.

The Court adds that there was no evidence that the current plaintiff, Robert I. Greenberg, has not been sued in his personal capacity throughout all the subject lawsuits. Plaintiff qualifies as the target of these lawsuits because the treatment he suffered was indistinguishable from that of a target or a personal defendant. Defendants [sic] Motion For JNOV is thereby denied.

MOTION FOR CERTIFICATION OF LEGAL QUESTION

Defendants ask this Court to certify to the Oklahoma Supreme Court questions concerning plaintiff's theory of liability. In keeping with the Court's earlier Order denying certification, the Court declines to certify these issues to the Oklahoma Supreme Court. The Court chooses to let its previous rulings on these issues stand. Oklahoma law supports this position by permitting the denial of certification if a substantial portion of the issues proposed for certification are without probable cause. Okla. Stat. tit. 20 § 1601 et seq. Defendants' Motion For Certification is denied.

MOTION FOR A NEW TRIAL

Defendants contend that a new trial is mandated because the Court committed prejudicial error. The Court ruled that Mrs. Wolfberg's testimony concerning whether she had or had not asked plaintiff for money amounted to a "judicial admission." Defendants are correct in stating that trial testimony can never be a judicial admission. See Hartford Fire Insurance Co. v. Carter, 196 F.2d 992, 996 (10th Cir. 1952). However, this is harmless error that does not mandate a new trial.

This error was harmless because there was no evidence in the record showing that financial troubles necessitated reaching the corpus of the trust. The Court concluded, after some protracted courtroom testimony from Mrs. Wolfberg, that she had deliberately attempted to skirt these financial issues. In support of this position, the Court notes that if defendants had financial troubles the money requests from plaintiff would be a significant point of contention for Mrs. Wolfberg and that it would be logical for Mrs. Wolfberg to testify concerning these matters in Kansas. The Court notes, however, that Mrs. Wolfberg curiously elected not to clarify these issues by testifying. These facts support the Court's conclusion that this error was harmless to the jury's overall verdict.

The Court may only set aside the jury's verdict when it concludes that the verdict is against the great weight of the evidence or when prejudicial error has entered into the record. McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990). The mere fact that the jury could have drawn different inferences or conclusions, or the fact that the Court believes that another result is more reasonable is no basis for granting a new trial. Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179, 186 (8th Cir. 1972) (citing Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944)), cert. denied, 410 U.S. 930 (1973). In lieu of these authorities, the Court concludes that the error entered on the record will not overcome the burden necessary for granting a new trial. Defendants' Motion For A New Trial is denied.

MOTION FOR REMITTITUR OF DAMAGES

Finally, defendants allege that the judgment cannot stand because the damages evidence presented to the jury was insufficient to support their verdict. Defendants also allege that the actual damages awarded by the jury are not stated with the requisite specificity to sustain the punitive damages award. The Court disagrees. The record is replete with evidence of the net worth of the parties; and, this evidence was sufficient to allow the jurors to calculate their damages award with requisite specificity. Testimony concerning the profit on the Wolfbergs' home alone could leave the jurors with ample information to base their damages awards on. In addition, the Wolfbergs' self-described "smart money" had to have been enough to genuinely smart any budget. Finally, the Court concludes by stating that there is no evidence that the punitive damages awarded were excessive. Defendants' Motion For Remittitur Damages is hereby denied.

IV. CONCLUSION

Accordingly, defendants Motion For JNOV, Certification To The Oklahoma Supreme Court, Motion For A New Trial, and Motion For A Remittitur Of Damages, are DENIED, and the judgment shall stand.

It is so ordered this 24th day of December, 1991.

/s/ Wayne Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX D

Robert I. GREENBERG,
Plaintiff-Appellee,

v.

Laurance B. WOLFBERG and Carolyn Wolfberg, Defendants-Appellants.

No. 81416

Supreme Court of Oklahoma.

Dec. 20, 1994

As Corrected Jan. 3, 1995.

OPALA, Justice.

The United States Court of Appeals for the Tenth Circuit [certifying court] certified the following questions pursuant to the Uniform Certification of Questions of Law Act, 20 O.S. 1991 §§ 1661 et seq.:

> 1. In light of the facts as detailed below that the Defendants Laurance B. Wolfberg and Carolyn Wolfberg either individually or combined instituted four separate lawsuits and filed one counterclaim against the Plaintiff Robert I. Greenberg or against a party with which Mr. Greenberg was in privity, may the four separate suits and the counterclaim be considered as a single suit (the "Process") for purposes of alleging malicious prosecution and abuse of process claims regardless of the varied disposition and success of the various separate actions?
>
> 2. Closely related to question 1 is whether the statute of limitations applicable to both the malicious prosecution and abuse of process claims should be applied to each individual action or to the process?
>
> 3. With respect to the abuse of process claim, does the statute of limitations begin to run with the

commencement or the termination of each individual action or of the Process?

4. What is the duration of the statute of limitations on an abuse of process claim?

We answer the certified questions as follows: (1) The availability of a multi-componential predicate for the torts of malicious prosecution and abuse of process[1] is determined by analyzing the proceedings in each *component* case. While *malicious prosecution* may be predicated upon *multiple litigation,* a malicious-prosecution plaintiff may not recover *actual damages* for proceedings that terminated *dehors* the applicable statutory limitation. (2) The time bar for both delicts pressed in federal court must be applied on a case-by-case basis. Nonetheless, those components of the "Process"[2] barred by limitation may be *relevant* in proving a case to recover for successive proceedings. The relevancy goes to the elements of probable cause, malice or punitive damages. (3) Viewing the third question as asking of us when the statute of limitation for an abuse-of-process claim commences, we answer that the limitation period begins when the abuse-of-process claim *accrues—i.e.,* when a plaintiff could have *"first* maintained the cause to a successful result."[3] (4) The statutory limitation for an abuse-of-process claim is two years.

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[1]Malicious prosecution and abuse of process are *common law actions* uninvaded and unmodified by this State's statutory regulations.

[2]*See* Part II, *infra,* for identification and explanation of the components of the "Process", as that term is used in the certified questions.

[3]*Neff v. Wilmott, Roberts & Looney,* 170 Okl. 460, 41 P.2d 86, 87 (1935).

I

THE ANATOMY OF FEDERAL LITIGATION[4]

Robert I. Greenberg [Greenberg or malicious-prosecution plaintiff] and Carolyn Wolfberg [malicious-prosecution defendant] are the children of Mal and Rose Greenberg. They are both potential beneficiaries of the Mal Greenberg Residual Trust. Greenberg is one of the trustees of that trust. While at his mother's death Greenberg is to receive his share of the residual trust outright, Carolyn is to have only the interest accruing on the trust's principal that remains after distribution to Robert.

In the 1970's Laurence B. Wolfberg [Wolfberg or malicious-prosecution defendant], Carolyn's husband, and Greenberg acquired interests in several business partnerships including, among others, Service Business Forms, Griffith Resources and Green Wolf Oil Company. In 1982 Greenberg and Wolfberg decided to sever their business ties. After effectuating this decision the parties engaged in a series of five forensic battles commencing in November 1986. Upon the culmination of these actions Greenberg brought suit on August 14, 1990 against the Wolfbergs for malicious prosecution and abuse of process. Judgment in Greenberg's favor was entered on October 8, 1991; the Wolfbergs appealed to the U.S. Court of Appeals for the Tenth Circuit, the certifying court.

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[4]The material accompanying the certified questions consists of the parties' briefs to the U.S. Court of Appeals for the Tenth Circuit. The factual recitals in the anatomy of federal litigation and in the discussion of the components of the Process were gleaned from this material and from the briefs submitted to this court.

II

THE COMPONENTS OF THE "PROCESS" IN THE SENSE DEFINED BY THE CERTIFYING COURT

In its proffered questions the certifying court defines the four predicate suits and one counterclaim between the litigating parties as the "Process". The components of the Process are as follows:

COMPONENT A:

Laurance B. Wolfberg v. Robert I. Greenberg, Cause No. CIV-86-2441-P, in the U.S. District Court for the Western District of Oklahoma, filed on November 3, 1986. In this action Wolfberg sought (a) an accounting for the profits and losses of Green Wolf Oil Company, a partnership, and (b) that partnership's dissolution. He also sought recovery for Greenberg's breach of fiduciary duties owed to this partnership. While Wolfberg prevailed in pressing for an accounting and dissolution of the partnership, he lost to Greenberg on the breach-of-duty theory. After appellate review by the certifying court, the U.S. Supreme Court denied certiorari on November 13, 1989.

COMPONENT B:

Service Business Forms Industries, Inc., Service Computer Forms Industries, Inc., Laurance B. Wolfberg and Carolyn Wolfberg v. Robert I. Greenberg, individually and as co-trustee under the Mal Greenberg Testamentary Trusts et al., Cause No. CJ-86-12606, in the District Court of Oklahoma County, filed November 26, 1986. The plaintiffs asserted four causes of action against Greenberg, individually and as trustee of the Mal Greenberg Testamentary Trusts. The claims dealt primarily with an asserted failure of consideration to support the stock redemption plan for the Mal Greenberg Testamentary Trusts' stock in Service Business Forms. By March 18, 1988 all causes stood dismissed *without prejudice.*

COMPONENT C:

Carolyn Wolfberg v. Robert I. Greenberg, individually and as co-trustee under the Mal Greenberg Testamentary Trusts et al., Cause No. CJ-86-12734, in the District Court of Oklahoma County, filed on December 3, 1986. Carolyn Wolfberg sought recovery for (1) Greenberg's breach of fiduciary duties owed to her by him as a trustee of the Mal Greenberg Residual Trust and (2) Greenberg's intentional infliction of emotional distress. The suit was dismissed *without prejudice* on September 17, 1987.[5]

COMPONENT D:

Carolyn Greenberg Wolfberg v. Robert I. Greenberg as co-trustee under the Mal Greenberg Testamentary Trust et al., Cause No. 88-C-3346, in the District Court, Sedgwick County, Kansas, filed on September 16, 1988. Carolyn Wolfberg sought the removal of the Mal Greenberg Testamentary Trust trustees because of their "prolonged and continued hostility and animosity" towards her. Judgment was entered for the defendants on January 25, 1990.

COMPONENT E:

Robert I. Greenberg as co-trustee of the Mal Greenberg Testamentary Trusts et al. v. Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc., Cause No. CIV-87-2769-A, in the U.S. District Court for the Western District of Oklahoma, filed on March 16, 1987. The trustees sought judgment on the defendants' note given as consideration in a stock redemption plan. The defendants counter-claimed against Greenberg, alleging he had relinquished his right to any monies due the trust under the note's term. Partial summary judgment, entered on March 14, 1988, and the final judgment of March 25,

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[5]For an explanation of the legal effect of a dismissed lawsuit (without prejudice) as a malicious-prosecution predicate, *see infra* note 40.

1988 went to the plaintiffs. The latter parties prevailed on all issues. The appellate process came to an end when the U.S. Supreme Court denied certiorari on January 16, 1990.

III

THE NATURE OF THIS COURT'S FUNCTION WHEN ANSWERING CERTIFIED QUESTIONS FROM A FEDERAL COURT

While we can set the parameters for the permissible use of (multiple) successive proceedings as a predicate for malicious prosecution, this court's assessment of the evidence adduced at the trial of this cause is beyond the allowable bounds of its responsibility. It is not this court's province to intrude (by responses to the certified questions) upon the federal court's decision-making process. Because *the case* is not before us for decision, we refrain from applying the given state-law responses to the facts elicited in the federal-court litigation or from passing upon the effect of federal procedure on the record and the issues in the case.[6]

IV

EXCEPT AS ALTERED BY OKLAHOMA'S CONSTITUTION AND HER STATUTES, THE COMMON LAW REMAINS IN FULL FORCE

To the extent that statutory provisions and this court's jurisprudence construing them do not yield complete answers to the questions posed, we have reached for this State's declared common law to supplement the responses

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[6]*Bonner v. Oklahoma Rock Corp.*, Okl., 863 P.2d 1176, 1178 n. 3 (1993); *Shebester v. Triple Crown Insurers*, Okl., 826 P.2d 603, 606 n. 4 (1992).

sought. By the mandate of 12 O.S. 1991 § 2[7] *the common law remains in full force unless a constitutional clause or a statute explicitly provides to the contrary.* The common law's legislative abrogation may not be effected by mere *implication;*[8] it must be clearly and plainly expressed.[9] A presumption favors the preservation of common-law rights.[10] In this State's legal tradition the common law forms "a dynamic and growing" body of rules that changes with the conditions of society.[11]

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[7]The relevant terms of 12 O.S. 1991 § 2 provide:

> "the common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma. . . ."

[8]*Tate v. Browning-Ferris, Inc.*, Okl., 883 P.2d 1218, 1225-26 (1992); *Silver v. Slusher*, Okl., 770 P.2d 878, 884 (1989); *Ricks Exploration v. Okl. Water Resources Bd.*, Okl., 695 P.2d 498, 504 (1985); *Roxana Petroleum Co. v. Cope*, 132 Okl. 152, 269 P. 1084, 1085 (1928) (the court's syllabus ¶ 3); *Reaves v. Reaves*, 15 Okl. 240, 82 P. 490, 495 (1905); *State Mut. Life Assur. Co. of Amer. v. Hampton*, Okl., 696 P.2d 1027, 1034, 1036 (1985) (Opala, J., concurring).

[9]*Fuller v. Odom*, Okl., 741 P.2d 449, 451 (1987); *McCormack v. Oklahoma Pub. Co.*, Okl., 613 P.2d 737, 740 (1980); *Reaves, supra* note 8, 82 P. at 495; *Hampton, supra* note 8 at 1036 (Opala, J., concurring).

[10]*Reaves, supra* note 8, 82 P. at 495; *Hampton, supra* note 8, 82 P. at 1036 (Opala, J., concurring).

[11]*Brigance v. Velvet Dove Restaurant, Inc.*, Okl., 725 P.2d 300, 303 (1986), quoting *McCormack, supra* note 9 at 740. *See also Vanderpool v. State*, Okl., 672 P.2d 1153, 1157 (1983).

V

MALICIOUS PROSECUTION

A majority of American courts concur in the notion that if the elements which comprise malicious prosecution are met and material damages are demonstrable, a plaintiff may prevail upon this cause of action *without having to prove special injury or grievance.*[12] Our jurisprudence clearly accords with this view. We do not recognize *interference with the person*[13] *or property*[14] of another as a required element for pressing this delict. The special-injury requirement stands supplanted by the malicious-prosecution plaintiff's heavy burden of proof. This onus serves to shield legitimate resort to the courts from subjection to vexatious litigation[15] and is consistent with our announced policy that disfavors this tort rubric.[16]

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[12]*See* W.L. PROSSER AND W.P. KEETON, THE LAW OF TORTS § 120, at 890-91 (5th ed. 1984).

[13]Examples of proceedings interfering with the person include, among others, lunacy, contempt, bastardy, juvenile delinquency and arrest under civil process. *See* PROSSER AND KEETON, *supra* note 12 at 890.

[14]Examples of proceedings interfering with a person's property include, among others, garnishment, replevin, attachment, the search of premises under a warrant, injunctions, proceedings in bankruptcy and for dissolution of a partnership. *See* PROSSER AND KEETON, *supra* note 12 at 890-91.

[15]*See* PROSSER AND KEETON, *supra* note 12 at 890.

[16]*Glasgow v. Fox*, Okl., 757 P.2d 836, 839 (1988); *Young v. First State Bank, Watonga*, Okl., 628 P.2d 707, 709 (1981); *Williams v. Frey*, 182 Okl. 556, 78 P.2d 1051, 1056 (1938).

A

The Elements of the Tort

We initially delineate the elements of *malicious prosecution drawn from proof supplied by multiple civil proceedings*. Identification of the constituent elements is *central* to consideration of the first certified question. It is only when the requirements for maintaining this tort are met that a malicious-prosecution claim arises and the running of limitation is triggered. While our jurisprudence has not previously addressed the question whether a malicious-prosecution claim can be based upon repetitive civil proceedings, the national body of the common law affords ample sources to guide our task.[17] It recognizes the delict of malicious prosecution based upon a *multi-componential predicate*, where a party (1) has brought successive suits against the same person upon *the same cause of action* after an adverse decision which should have ended the controversy *or* (2) has filed separate actions upon the *same claim*.[18] We recognize today RESTATEMENT

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[17]*See* RESTATEMENT (SECOND) OF TORTS § 679 (1977) which states in pertinent part:

> "One who repeatedlly initiates civil proceedings against another for the same cause of action is subject to liability for the harm caused thereby, if
>
> (a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favor of the person against who they are brought."

[18]*See* RESTATEMENT (SECOND) OF TORTS § 679 comment b (1977). It makes § 679 applicable not only (a) when the original

[Footnote continued on next page]

(SECOND) OF TORTS § 679[19] as the correct exposition of this State's common law.[20]

For the use of a multi-componential predicate in malicious prosecution *the same cause of action* must have been asserted in each component. The plaintiff must prove the malicious-prosecution defendant (1) initiated the proceedings[21] embraced within the multi-componential

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plaintiff is relitigating a claim which has been decided adversely to that plaintiff but also (b) when a number of separate proceedings for the same cause of action are initiated by a legal entity.

[19]For the text of RESTATEMENT (SECOND) OF TORTS § 679, see *supra* note 17.

[20]Restatements of the common law on chosen subjects, which are produced by the American Law Institute, a private national organization of judges, practitioners, and law teachers, are scholarly "*codifications of American common law in various substantive law areas, based upon the decisions of the courts of last resort of the states.*" (Emphasis added.) Winters, The Contribution of Professional Organizations to Stability and Change Through Law 265, 269 (1963). For a history of the Institute, see Goodrich, The Story of the American Law Institute, 1951, Wash. U.L.Q. 283; *see also* Krause, Gans, 1 The American Law of Torts § 1:18 at 61 (1983); PROSSER AND KEETON, *supra* note 12, § 3 at 17.

[21]"*Proceeding*" here includes "*counterclaim*". *See* RESTATEMENT (SECOND) OF TORTS § 674, comment a, which states:

[Footnote continued on next page]

predicate and these proceedings were (2) brought *without* probable cause, (3) motivated by malice, (4) terminated in the plaintiff's favor and (5) damaging to the plaintiff.[22]

While *earlier* components of the predicate may serve as an element's proof in a *later* proceeding, *each individual suit* must satisfy the critical elements of (a) initiation by the malicious-prosecution defendant, (b) termination favorable to the malicious-prosecution plaintiff and (c) lack of probable cause.[23] There is an exception to the lack-of-

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> "Since the term 'civil proceedings' includes a counterclaim, one who files a counterclaim to a cause of action initiates a civil proceeding."

See also 12 O.S.1991 § 2013 for Oklahoma's statutory treatment of counterclaims.

[22]*Reeves v. Agee*, Okl., 769 P.2d 745, 752 (1989); *Young v. First State Bank, Watonga*, Okl., 628 P.2d 707, 709 (1981); *Page v. Rose*, Okl., 546 P.2d 617, 620 (1976); *Browning v. Ray*, Okl., 440 P.2d 721, 724 (1968); *Towne v. Martin*, 196 Okl. 510, 166 P.2d 98, 100 (1945); *Sawyer v. Shick*, 30 Okl. 353, 120 P. 581, 582 (1911).

[23]The court in *Sawyer, supra* note 22, 120 P. at 582, drew a critical distinction between malice and want of probable cause when it observed:

> "Malice may be inferred from a total want of probable cause, but, *e converso*, a total want of probable cause cannot be inferred from malice."

[Footnote continued on next page]

probable-cause requirement where an earlier action, although brought with probable cause, is decided adversely to the malicious-prosecution defendant.[24] There, if successive suits are brought on the same cause of action, the plaintiff may use the *earlier*, adversely-decided action to prove one or more of the § 679 tort's elements. Nonetheless, *no actual damages* may be recovered for the earlier action if it was brought *upon* probable cause.[25]

B

Initiation of the Action by the Malicious-Prosecution Defendants

In the five components of the Process there are four separately identified plaintiffs—Laurance B. Wolfberg, Carolyn Wolfberg, Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc. To combine these components into a "single suit" requires an inquiry into the relationship of the various plaintiffs, each to the other. Where there is (1) a common claim asserted in the

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See also Browning, supra note 22 at 725, where it was held that if the evidence establishes that an action was instigated *without* probable cause, malice may be implied or inferred.

[24]For a discussion of the basis for the exception, see Subpart (V)(C), *infra*.

[25]Our jurisprudence recognizes that probable cause is a complete defense to a malicious-prosecution claim. *See Page, supra* note 22 at 620. To allow recovery for a suit brought upon probable cause would undermine this rule of law.

components of the Process[26] and (2) privity of interest or estate between the parties who initiated the suits,[27] the actions can be combined to assert a malicious-prosecution claim. Disparity among the identities in which a malicious-prosecution plaintiff is sued can also be resolved by the same analysis. If there is a privity of interest or estate among the different legal entities by which the malicious-prosecution plaintiff was haled into court, that plaintiff may combine the proceedings as a predicate to allege the delict if the component suits are based upon a common cause of action.

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[26]*See Shedd v. Patterson*, 301 Ill. 355, 134 N.E. 705, 707 (1922); *Soffos v. Eaton*, 152 F.2d 682, 683 (D.C. Cir. 1945); *Ripley, infra* note 31, 198 S.W.2d at 864 (the plaintiff alleged that where a defendant initiated a series of suits for the *same cause of action*, it amounted to harassment; and he prevailed upon the delict of malicious prosecution); *Trueman Fertilizer Company v. Stein*, 84 So.2d 570, 572 (Fla. 1956) (malicious prosecution lies where, after a previous adverse decision, the malicious-prosecution defendant brings successive suits against the same person upon the same cause of action).

[27]*See Cartwright v. Atlas Chemical Industries, Inc.*, Okl., 623 P.2d 606, 611 (1981), where the court held that (a) "nominal parties to an action" include those who "have control of the prosecution or defense in furtherance of their own interest and who enjoy, because of factual circumstances, all the rights of an actual party," and (b) that a person meeting these criteria is a "*privy in interest*". *Id.* at 611. *See also Soffos, supra* note 26 at 682; *Ripley, infra* note 31, 198 S.W.2d at 864.

C

Lack of Probable Cause

Greenberg has the affirmative duty of proving[28] that the malicious-prosecution defendants brought the component actions *without probable cause*.[29] In pressing malicious prosecution based upon multiple civil proceedings, one could encounter an *earlier* component of the Process which may have been filed *with* probable cause.[30] Nevertheless,

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[28]Here the burden of proof is by a *preponderance of the evidence*. *Young, supra* note 16 at 712.

[29]*Probable cause* is a reasonable belief in the existence of the facts upon which the claim is based and a reasonable belief that under such facts the claim may be valid either at common law or under an existing statute. *Young, supra* note 16 at 710-12; *Lewis v. Crystal Gas Company*, Okl., 532 P.2d 431, 433 (1975); *Towne, supra* note 22, 166 P.2d at 100; *Gray v. Abboud*, 184 Okl. 331, 87 P.2d 144, 147 (1939). Where the facts which relate to the existence of non-existence of probable cause are admitted and support but a single inference, whether they constitute probable cause is a question of law for the court's determination. *Robberson v. Gibson*, 62 Okl. 306, 162 P. 1120, 1124 (1917).

[30]In assessing whether the malicious-prosecution defendant had probable cause to bring the component actions, the trial court must inquire whether the advice of counsel was honestly sought and acted on in good faith by the malicious-prosecution defendant after a *full and fair disclosure of all known [as distinguished from discoverable] material facts*. If this inquiry establishes that counsel's advice was relied upon by the plaintiff in bringing the component actions, it is a *complete defense* to malicious prosecution. *Page v. Rose*, Okl., 546 P.2d 617, 621 (1976); *Lewis, supra* note 29 at 433-34; *Williams, supra* note 16, 78 P.2d at 1056-57; *El Reno Gas & Electric Co. v. Spurgeon*,

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if the earlier action had been determined adversely to the malicious-prosecution defendant, subsequent suits asserting the same cause of action presumably will have been instigated *without* probable cause. For *evidentiary* purposes the relevancy of the earlier adversely-determined cause is not denigrated by its status as a time-barred component in the action.[31] Nonetheless, there may be *no* recovery of *actual* damages suffered from suits *dehors* the applicable statutory limitation.[32]

D

Malicious Motivation

The essence of malicious prosecution is abuse of judicial process occasioned by *bringing* a civil proceeding *with* malice.[33] When a malicious-prosecution defendant (1) instigates successive suits upon a cause of action after an adverse determination, (2) files repetitive suits for the *same* cause of action before any are resolved or (3) initiates, dismisses and refiles the same cause of action, the bringing of the successive actions [even those concluded *dehors* the applicable statutory limitation] may be used as

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30 Okl. 88, 118 P. 397, 400 (1911). This result will not follow if the agency of the malicious-prosecution defendant's attorney was coupled with an interest. For a definition of a power coupled with an interest, see *Bowman v. Ledbetter*, 173 Ok. 345, 48 P.2d 334, 335 (1935). *See also* RESTATEMENT (SECOND) OF TORTS § 675, comment h (1977).

[31]*Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861, 866 (1947).

[32]*Id.*, 198 S.W.2d at 866.

[33]*Young, supra* note 16 at 710.

proof of an improper motive or of malice.[34] Nonetheless, where the earlier action *has not been adversely concluded*, successive proceedings upon the *same cause of action* are *not* relevant to *a lack of probable cause*.[35] The malicious-prosecution plaintiff carries the burden of proving the defendant's want of probable cause in bringing *each action comprising the multi-componential predicate*.

E

Termination in Favor of the Malicious-Prosecution Plaintiff

The fourth element of malicious prosecution requires that the claim terminate[36] in the plaintiff's favor in *each* of the component suits of the Process.[37] The Wolfbergs assert that component A was not resolved in Greenberg's favor. The material submitted, supplemented by the admissions in the parties' briefs in this court,[38] demonstrates that

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[34]*See* RESTATEMENT (SECOND) OF TORTS § 679, comment c (1977). *See also Myhre v. Hessey*, 242 Wis. 638, 9 N.W.2d 106, 111 (1943).

[35]*See* RESTATEMENT (SECOND) OF TORTS § 679, comment c (1977). *See also Page, supra* note 22 at 622.

[36]A proceeding is *not* terminated until all appeals concerning the cause are concluded. *See* RESTATEMENT (SECOND) OF TORTS § 659, comment f and § 674, comment j; *see also Harper v. Cox*, 113 Kan. 357, 214 P. 775 (1923).

[37]Resolution of the proceeding in favor of the person initiating it is conclusive proof that the action was brought *with* probable cause. *Glasgow, supra* note 16 at 838. *See also* RESTATEMENT (SECOND) OF TORTS § 675, comment b.

[38]Admissions made in the briefs may be considered as supplementing and curing an otherwise deficient appellate

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Wolfberg asserted *separate* claims in component A—one for an accounting and dissolution of the partnership interests shared with Greenberg and a second claim for alleged breach of fiduciary duties owed by Greenberg to Green Wolf Oil Company. Where more than one claim is asserted in a proceeding, it is proper for the court to review each claim *separately* to determine if it satisfies the delict's critical elements. If a claim is terminated in favor of the malicious-prosecution plaintiff, an action for malicious prosecution will lie on that singular claim, regardless of who prevails on other claims pressed in the same suit.[39]

For there to be a prevailing party in an action requires that the underlying proceeding *not* have been dismissed *without* prejudice. *Dismissal without prejudice* is *not* a termination favorable to the malicious-prosecution plaintiff. To hold differently would be to countenance the possibility of countervailing results arising from the same action.[40]

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record. *Reeves, supra* note 22 at 753; *Womack v. City of Oklahoma City*, Okl., 726 P.2d 1178, 1181 (1986); *Timmons v. Royal Globe Ins. Co.*, Okl., 713 P.2d 589, 592 n.10 (1985).

[39]*Reeves v. Agee*, Okl., 769 P.2d 745, 752-54 (1989).

[40]The second and third components of the Process identified by the certifying court were dismissed *without prejudice. An action dismissed without prejudice may not serve as a componential predicate for a malicious-prosecution action.* Malicious prosecution requires that the predicate action be terminated in the malicious-prosecution plaintiff's favor. *Glasgow, supra* note 16 at 839. *See also Heck v. Humphrey*, ___ U.S. ___, ___, 114 S.Ct. 2364, 2371, 129 L.Ed.2d 383 (1994).

F

The Statute of Limitation Trigger

The limitation period for malicious prosecution[41] is triggered by *accrual of the cause of action.*[42] To determine when a cause accrues the court must ascertain (1) the nature of the right the litigant seeks to assert and (2) when the plaintiff could have *first* maintained the cause advanced to a

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[41]The pertinent terms of 12 O.S. 1991 § 95 are:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, *after the cause of action shall have accrued*, and not afterwards: * * *
>
> Fourth. Within one (1) year: An action for libel, slander, assault, battery, *malicious prosecution* or false imprisonment;...." [Emphasis added.]

[42]In *Retherford v. Halliburton Company*, Okl., 572 P.2d 966 (1978), we defined *cause of action* as follows:

> "A cause of action ... exists to satisfy the needs of plaintiffs for a means of redress, of defendants for a conceptual context within which to defend an accusation, and of the courts for a framework within which to administer justice.
>
> * * * * * *
>
> "[T]his jurisdiction is committed to the wrongful act or transactional definition of a 'cause of action.' Thus, no matter how many 'rights' of a potential plaintiff are violated in the course of a single wrong or occurrence, damages flowing therefrom must be sought in one suit or standbarred by the prior adjudication." *Id.* at 968-69.

successful result.[43] Generally, the one-year time bar is set in motion by each *qualified* componential predicate terminated in favor of the malicious-prosecution plaintiff.[44] This is the temporal point that triggers the limitation clock.

VI

ABUSE OF PROCESS[45]

A

Elements of the Tort

The quintessence of *abuse of process* is "not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate

---

[43]*Samuel Roberts Nobel Foundation, Inc. v. Vick*, Okl., 840 P.2d 619, 624 (1992); *Neff, supra* note 3 at 87.

[44]*Noble Foundation, supra* note 43 at 624; *Reeves, supra* note 22 at 757; *Neff, supra* note 3, 41 P.2d at 87. An action's dismissal *without prejudice* is not recognized as a successful termination for the malicious-prosecution plaintiff. *See Glasgow, supra* note 16 at 839.

[45]*See* PROSSER AND KEETON, *supra* note 12, § 121 at 897 where abuse of process is distinguished from malicious prosecution in the following manner:

> "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish."

See also Donohoe Const. v. Mount Vernon Associates, 235 Va. 531, 369 S.E.2d 857, 862 (1988), which accords with this view.

ends."[46] The tort's elements are (1) the improper use of the court's process[47] (2) *primarily* for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse.[48] Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse if the court's process is used legitimately to its *authorized* conclusion.[49] The party who asserts the abuse-of-process claim is *not required* to prove (1) the underlying action was brought *without probable cause* or (2) that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded.[50]

---

[46]*Heck, supra* note 40 at ___ U.S. ___, 114 S.Ct. at 2372.

[47]The word "*process*", as used in the tort of "abuse of process", encompasses the entire range of procedures incident to the litigation process. *See Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 880 (1982).

[48]*Neil v. Pennsylvania Life Insurance Company*, Okl., 474 P.2d 961, 965 (1970); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 116 (10th Cir. 1983). *See also* RESTATEMENT (SECOND) OF TORTS § 682 which states the general principle of the delict as:

> "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

[49]*Donohoe, supra* note 45, 369 S.E.2d at 862; *see also* RESTATEMENT (SECOND) OF TORTS § 682, comment b.

[50]The abuse-of-process delict had its genesis in the case of Grainger v. Hill, 132 Eng.Rep. 769 (1828). *Grainger* is instructive in answering the third certified question. It holds that:

[Footnote continued on next page]

These principles impel the conclusion that it is not the "commencement or the termination" of a proceeding which triggers the limitations period for this tort. Rather, it is the *accrual* of the cause of action.[51] An abuse-of-process claim accrues when the process is abused and damages are incurred, *regardless of when the action is determined.* Because this delict concerns itself with specific misapplications or misuses of process, the statute of limitation must be applied *separately* to each component of the Process. The court may find earlier components of the Process [as defined by the certifying court] relevant as proof of an ulterior or improper motive in a subsequent action. Nonetheless, unless a court's *process* has been *misused or misapplied* in the *specific* proceeding relied upon to assert the abuse-of-process claim, the delict is not maintainable.

B

The Limitation Period for Abuse of Process

Because the tort of abuse of process is not included *eo nomine* among the delicts enumerated in 12 O.S. 1991

[Footnote continued from previous page]

> "[The Plaintiff's] complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is *immaterial whether the suit which that process commenced has been determined*, or not, or whether or not it was founded on reasonable and probable cause." *Id.* at 773. [Emphasis supplied.]

[51] *See supra* Subpart V(F) for a complete discussion of the statute-of-limitation trigger for actions governed by 12 O.S. 1991 § 95.

§ 95(4)[52]—those which are governed by a one-year time bar—*it falls within the unenumerated class* for which a two-year limitation period is provided by 12 O.S. 1991 § 95(3).[53] At the time § 95(4) was enacted the torts of malicious prosecution and abuse of process *both were known to the common law of Oklahoma as distinct delicts*; yet, abuse of process is not included among the actions governed by the one-year statutory time bar. Based upon the time-honored canon of construction known by the Latin phrase of *expressio unius est exclusio alterius*,[54] we conclude that the legislature *intended to exclude* abuse of

---

[52]For the civil actions included in 12 O.S. 1991 § 95(4) see *supra* note 41.

[53]The pertinent terms of 12 O.S. 1991 § 95 are:

> "Civil actions other than for the recovery of real property can only be brought within the following periods, *after the cause of action shall have accrued*, and not afterwards:
> * * *
> Third. Within two (2) years: An action for ... injury to the rights of another, not arising on contract, and not hereinafter enumerated;...." [Emphasis added.]

[54]This maxim of statutory interpretation means that *the expression of one thing is the exclusion of another. Newblock v. Bowles*, 170 Okl. 487, 40 P.2d 1097, 1100 (1935). *See also Williams v. Lee Way Motor Freight*, Okl., 688 P.2d 1294, 1301 n.17 (1984) (Opala, J., dissenting). The canon is applicable only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended for inclusion in the statute. *Hardesty v. Andro Corp.-Webster Division*, Okl., 555 P.2d 1030, 1036 (1976); *Spiers v. Magnolia Petroleum Co.*, 206 Okl. 510, 244 P.2d 852, 856-57 (1952).

process from the class of torts for which a one-year limitation was established.

VII

CONCLUSION

Application of the rules announced today requires that malicious prosecution be distinguished from abuse of process—the former lies for the malicious *initiation* of process and the latter for a *perversion* of the process *after* it is issued. If process is wrongfully initiated and later perverted, both torts would lie since they are not to be viewed as mutually exclusive delicts. The limitation periods for both torts are triggered by accrual of the respective causes of action. Because malicious prosecution is a tort disfavored by our jurisprudence and abuse of process is fact-specific, *i.e.*, tied to misuse of process in a particular action, the applicable limitation period must be gauged on a case-by-case basis. As pointed out earlier in this opinion, the question—whether the *earlier* components of the Process are relevant to show (a) in malicious-prosecution claims the elements of probable cause, malice and/or punitive damages or (b) in abuse-of-process claims improper or ulterior motives or application—constitutes a matter within the certifying court's cognizance.[55]

CERTIFIED QUESTIONS ANSWERED.

HODGES, C.J., LAVENDER, V.C.J., and HARGRAVE, OPALA, ALMA WILSON, SUMMERS and WATT, JJ., concur;

SIMMS and KAUGER, JJ., concur in result.

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[55]*See Shebester, supra* note 6 at 606.

APPENDIX E

EXCERPTS FROM TRIAL TESTIMONY OF ROBERT I. GREENBERG

* * * * *

Q Do you know what you have paid in attorney's fees in this case?

A Yes. In rough numbers, I do. I have the exact amounts, but not in my head.

Q What are those amounts?

A They vary from case-to-case because some of the cases did not go, proceed to trial, and some did not go all the way through appeals. The total amount that I am out-of-pocket is in the neighborhood of approximately $60,000.

Q And that is for you alone?

A Yes. Now, that does include what would be my share of trust monies expended on behalf of the Trust, money that would come to me had there been no lawsuits.

Q What would that amount be?

A Well, that included, as I say, that 60 included approximately $30,000 of trust bills. In other words, the Trust, I'm not including in the 60,000 other expenses of the Trust; I'm only including that part, that would have been roughly the one-half of the Trust, that would have been mine.

Q Mr. Greenberg, have you lost any income through failure to be able to devote the necessary time to your work while you were defending these lawsuits?

A Yes, I would say so.

Q Would you explain how.

A Well, I was basically under a, roughly, a five-year situation where any new venture I did involving the family became the subject of a lawsuit, so I eventually came to the position that I simply could not participate in any ventures that would come to my attention that otherwise might be worthy.

Q Can you give me a specific example?

A Yes, I can.

Q Would you do that, please.

A About a year and-a-half ago I was approached by a gentleman who knew I was in the golf course business, and with a proposal that if I would aid and assist him in putting a new golf course project together in Oklahoma City that I would be given a share of that golf course for my services, but without any charge to me monetarily.

Q Do you know what that golf course was -- what share of the golf course?

A Ten percent.

Q Do you know what that share would be worth?

A He succeeded in doing that project, it's just about complete now, and the involvement in that is approximately two-and-a-half million dollars, that is the rate --

Q That would be your share?

A My share would have been worth at least, to date, $250,000. I turned him down and I explained I just did not feel I could devote the time, I wasn't free to devote the time to it.

A Every maneuver, every proceeding, every stage of each lawsuit took tremendous time. For example, we haven't even talked on the note case, the fifth case; there was actually an arbitration stage, before it ever came to

trial, where the arbitrators, three arbitrators were selected, and we had to prepare for that.

Q Did you prevail at that hearing?

A Yes, we did prevail at that hearing. But it was just like a trial, it was like another trial, and we had to do it. And after we won at that, I was hoping there would be no need for a trial; and then there was a trial, and we had to prepare for that. Just as you prepare for something like this, it takes several days. All these were -- many were going on at the same time. There was never a time where there wasn't at least one or two cases going on, involving millions of dollars. And there was always the fear, and I mean fear, --

MR. FRANKS: Your Honor, I'm sorry, I'm going to object. The question, as I recall, was how much time, and I don't think we have a responsive answer on the way here.

THE COURT: Overruled.

A There was always the fear that I would not be able to prepare my case to state it in such a way that these allegations could be shown for what they were, false.

* * * * *

Q All right. Did you testify that you thought you made -- perhaps paid $30,000 and the Trust perhaps paid $30,000 for other things?

A Yes. What I tried to say, and I would not change what I said but I may not have explained it correctly; because my share was mostly from the Green Wolf case and I split some costs with the Trust, the -- what I'm trying to say is that if you would take the half of the Trust that was not reimbursed for the legal fees, in the case number five there was reimbursement of the Trust for legal fees but that's the only time it happened, if you would take all the other legal fees of the Trust, divide it by two and add that to the amount that I was out-of-pocket myself for defending

these lawsuits, you would come up to $60,000. That was particularly my share.

Q All right. I think I'm confused and need to follow up on that.

A I know, it would be easier to show you.

Q Let me just ask some specific questions, --

A Go ahead.

Q -- perhaps we can clarify this.

THE COURT: Let me ask one initially. When you speak about that division of fees affecting the Trust, are you referring to the fact that you are potentially a person to whom the corpus of the Trust would be distributed?

THE WITNESS: Yes, sir.

THE COURT: And so is that why you are counting that as an amount of expenditure that would ultimately be borne by you?

THE WITNESS: Yes, it would diminish the Trust corpus forever.

Q Let me ask you, and perhaps that might be a proper subject that the Judge will instruct on at some time, but let me ask you; without regard to that kind of consideration and just as to the raw numbers, what do you believe that you have spent out of your own pocket on these cases, and only if you know, do you know what you spent out of your own pocket?

A Well, there unfortunately have been more cases than just those five cases, but on those five cases --

Q Well, I'm asking about the five cases on your chart there, sir.

A On those five cases, --

Q And the proceedings in connection with them.

A -- on the part that I spent out-of-pocket myself and not being reimbursed for, is around $34,000.

Q And tell me where you did receive some reimbursement for fees in connection with any of those.

A It was in the fifth case.

* * * * *

Q You testified, sir, as I recall, to only a single what might have been characterized as a business opportunity which you felt you had foregone, and thought that your decision would be that that might have been related to these cases. And that was an opportunity to participate in a golf course development?

A Well, I think there were two I mentioned in my deposition, I want to be accurate.

Q Well, I'm talking about here at trial today.

A Trial? I believe I testified about one.

Q And how is it that you happened to know -- I believe you tried to attribute -- or you testified that you could attribute what you thought your interest in that might have been worth had you taken it, to what you thought its actual value is right now, and the fact you thought that you would have ten percent of it. And what I want to know is where you get your information, why do you know or think that this is a two-and-a-half million dollar asset, I think was the figure you used.

A Well, the developing partner has kept me informed, I have tried to help him any way I could. He's kept me informed and I've tried to advise him down the line, so that I am indeed familiar with the amount of money he raised to develop that golf course. That's really --

Q Is that a public golf course?

A -- what it takes to -- roughly a million dollars for the l d cost and about a million-and-a-half to actually do the things that you need to do to develop that land into a golf course.

Q I see. So what you're talking in terms of is the amount of money that had been invested into it or borrowed by it in order to put it together?

A Yes, that's the amount money he raised.

Q That's how much money he raised?

A That's what it took to do the project, which I would have had ten percent of, if I felt like I could do -- spend the time that I needed to spend on that.

* * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LAURENCE B. WOLFBERG, Plaintiff,	)	
v.	)	No. CIV-86-2441-P
ROBERT I. GREENBERG, Defendant.	)	

ORDER

This case was tried to the Court, sitting without a jury, on November 17 and 18, 1987. By Memorandum Opinion and Judgment entered December 17, 1987, the Court found in favor of defendant and against plailntiff on plaintiff's claim of breach of fiduciary duty. Parties were ordered to execute appropriate documents to affect the dissolution of the partnership. Subsequently, defendant filed a timely motion to tax attorney's fees as costs. Plaintiff has now responded in objection, and in consideration of the briefs of the parties, the Court denies defendant's motion for the assessment of attorney's fees.

Absent a statute or enforceable contract provision, a prevailing party is not entitled to recover attorney's fees. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975); Sisney v. Smalley, 690 P.2d 1048 (Okla. 1984). Defendant in this case cites Pope v. Vernon, 383 P.2d 9 (Okla. 1963) as authority for the recovery of attorney's fees. The authority of Pope is questionable, at best, in light of the Oklahoma Supreme Court's more recent rulings on the recoverability of attorney's fees. In Sisney, 690 P.2d at 1049, the Oklahoma Supreme Court described the only exception to the general rule to be "where equitable considerations demand when the services performed result in a succesful suit for the preservation, or increase of a common fund or a common property for the benefit of a

class of persons entitled to the fund or property," citing State ex rel. Burk v. Okl. City, 522 P.2d 612 (Okla. 1973). This exception would not apply here. However, assuming Pope permits the assessment of attorney's fees as an item of costs in a suit for an accounting of partnership assets, it does not require such an award. For the reasons stated below, the Court would decline to award attorney's fees.

Defendant asserts that where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, the Court may award attorney's fees. Assuming, without deciding, that this is a correct statement of the law of Oklahoma, the Court, in its discretion, declines to award attorney's fees to defendant on this basis. Plaintiff's lawsuit was not totally groundless. He succeeded in obtaining an accounting and final dissolution of the partnership. While the Court has held that plaintiff had not proved his cause of action on breach of fiduciary duty, this holding does not presume that the lawsuit was frivolous. On the contrary, plaintiff had a legally and factually arguable claim for relief, which was ultimately resolved against him. The Court cannot say, as a matter of law, that the lawsuit was filed in bad faith or for oppressive reasons.

Defendant, citing no statutory, contractual or other persuasive authority for the imposition of attorney's fees against plaintiff, must fail. His motion to tax defendant's attorney's fees as costs is therefore overruled.

IT IS SO ORDERED this _____ day of January, 1988.

/s/Robin J. Cauthron
Robin J. Cauthron
UNITED STATES MAGISTRATE

APPENDIX G

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
F I L E D
OCT 17 1995
CLERK

No. 95-433

In The

Supreme Court of the United States

October Term, 1995

LAURANCE B. WOLFBERG AND
CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In this response, Robert I. Greenberg will be referred to as "Greenberg" and Laurance Wolfberg will be referred to as "Wolfberg." Laurance and Carolyn Wolfberg will be referred to collectively as "the Wolfbergs."

STATEMENT OF THE CASE

This appeal is from a jury verdict in favor of Robert I. Greenberg on his cause of action against the Wolfbergs for malicious prosecution and abuse of process, based upon claims brought against him serially and contemporaneously in five lawsuits beginning in 1986 and continuing into 1990. The Wolfbergs sought punitive damages against Greenberg for millions of dollars, seeking over ten million dollars in punitive damages in one lawsuit alone. Their avowed intent was to break Robert I. Greenberg financially and emotionally. They lost their claims for damages in toto.

Greenberg's case against the Wolfbergs was filed in the United States District Court for the Western District of Oklahoma. At trial, the jury found in response to special interrogatories that each of the five predicate lawsuits was brought with malice and without probable cause and constituted both malicious prosecution and abuse of process. Greenberg was awarded actual damage jointly against the Wolfbergs in the amount of $284,000, and punitive damages in the amount of $1,750,000 against

Laurance Wolfberg and $500,000 against Carolyn Wolfberg. On appeal, the Tenth Circuit Court of Appeals reviewed the proceedings in the trial court and in conjunction with that review certified questions to the Oklahoma Supreme Court concerning the propriety of combining the predicate litigation into a single action. Petition at 29a. Following the response by the Oklahoma Supreme Court to that inquiry, the Tenth Circuit Court of Appeals affirmed the judgment of the trial court. Petition at 1a. The Wolfbergs now petition this court for certiorari asserting the punitive damage verdict against them is unconstitutionally large.

STATEMENT OF FACTS

Although the Wolfbergs seek to trivialize the series of lawsuits which form the predicate for this action as a mere "family feud", Laurance Wolfberg's directive to his attorneys discloses his intent to remove Greenberg from his position of influence within the family, destroy him emotionally and financially, and "bring him to his knees" through multi-million dollar judgments. App. 30a. As part of an "overall legal strategy", App. 32a, the Wolfbergs sought to force Greenberg's resignation as trustee of his father's testamentary trust, avoid payments of their company's promissory note to the trust and acquire property owned by the trust at a fire-sale price. Alternatively, the Wolfbergs sought to dissolve the trust entirely. A synopsis of the personal and business relations between the parties, as well as an accurate portrayal of the Wolfbergs' motives and actions in bringing the five predicate lawsuits, is necessary for this court to appreciate the

malice which the jury saw in the Wolfbergs, and for which the punitive damages were assessed.

A. THE PARTIES

Carolyn Wolfberg and Robert Greenberg are the children of Mal and Rose Greenberg. Laurance Wolfberg is the husband of Carolyn Wolfberg. For a number of years Robert Greenberg and Laurance Wolfberg shared their business operations on an equal basis, including the operation of Service Business Forms, a company founded by Mal Greenberg; Griffith Resources, an oil field service company; and Green Wolf Oil Company, an oil and gas partnership. By his will, Mal Greenberg established a testamentary trust which would devolve to his children upon the death of their mother, with Robert Greenberg to receive his share outright and Carolyn Wolfberg's share to be held in trust. By the terms of Mal Greenberg's will, she is to be periodically paid interest on the principal which remains in trust for her benefit and which will be distributed upon her death. Robert Greenberg was designated as a trustee of both the Mal Greenberg Testamentary Trust and the trust for Carolyn Wolfberg's benefit.

In October, 1982, Greenberg and Wolfberg agreed to separate their business interests. In the division, the Wolfbergs acquired Service Business Forms ("Service"). Wolfberg wanted all of the outstanding stock in Service, some of which was owned by the Mal Greenberg Testamentary Trust. A price was negotiated for the Trust stock whereby Service executed a note in favor of the Trust for $100,000. Around that same time period, Griffith Resources, which

Greenberg and Wolfberg owned with a cousin, was faced with a post-oil-boom-recession $1,000,000 cash call from the bank which had loaned them the capital for its formation. At Wolfberg's suggestion, the family shared the bank's demands pro-rata, with the share of Greenberg and Wolfberg paid through a loan to Griffith by Green Wolf Oil Company, their oil and gas partnership.[1]

In October, 1986, Service defaulted on the note and was put on notice of acceleration of the terms of payment. Because Wolfberg anticipated the Trust would eventually sue Service to collect on its note, he and his wife elected to strike first. They filed three of the predicate groundless lawsuits which form the basis of this case within a 30 day time period, charging Robert Greenberg with fraud, conversion and breach of fiduciary duty, seeking over $10,000,000 in punitive damages against Greenberg personally, removal of the Trustees, and relief from payment of the Service note.

B. THE PREDICATE LAWSUITS

Case #1

Based on alleged wrongdoing in winding down the Green Wolf partnership, Predicate Case #1 was filed November 3, 1986 in the United States District Court for

---

[1] During this same time period, the Green Wolf partnership was dissolved. Although Greenberg asked Wolfberg for suggestions for winding down the affairs of the partnership, he received none. He was left no choice but to shoulder that responsibility himself.

the Western District of Oklahoma, styled *Laurance Wolfberg v. Robert I. Greenberg*, Case No. CIV-86-2441-C. The first claim sought an accounting and one-half of partnership profits realized from alleged wrongful use of Wolfberg assets; the second claim alleged Greenberg fraudulently breached fiduciary duties by borrowing money and converting partnership assets. As relief, Wolfberg sought to have Greenberg declared completely liable for the $400,000 loan to Griffith Resources, and prayed for $1,000,000 in punitive damages.

Although an accounting was granted, it revealed no wrongdoing on Greenberg's part, and Wolfberg did not prevail on any of his damage claims.[2] In so ruling, Magistrate Robin Cauthron made an express finding that Wolfberg's testimony on one point was so incredible that it tainted his credibility on every other issue. App. 6a. After the Tenth Circuit Court of Appeals affirmed, Wolfberg directed his lawyers to petition for certiorari as part of his "overall legal strategy." App. 32a. The Wolfbergs sought to force removal of Greenberg as trustee pending certiorari so that their overall purpose might yet be accomplished. The writ was denied November 13, 1989.

---

[2] A claim that Greenberg had fraudulently borrowed money in partnership name and converted it to his own use was abandoned by his lawyers in their final contentions, despite the fact that Wolfberg had admittedly known for nearly ten months that this claim was groundless.

Case #2

With the awareness that the Trust would likely file suit to collect on the note, Predicate Case #2 was filed November 26, 1986 in the District Court of Oklahoma County, Oklahoma, styled *Service Business Forms, Service Computer Forms, Laurance Wolfberg and Carolyn Wolfberg v. Robert I. Greenberg, Trustee, Maynard Greenberg, Trustee, Rose Greenberg, Trustee, and Robert I. Greenberg, Individually,* Case No. CJ-86-12606. This lawsuit sought damages in the amount of $300,000 for breach of contract and fraud, and $1,000,000 punitive damages against Greenberg.

Based on a purported promise by Greenberg to disclaim proceeds on the note, this lawsuit was admittedly filed in an attempt to force Greenberg, on behalf of the Trust, to file a "mandatory" counterclaim on the note in this state court action. However, the Trust filed a separate federal action (Case #5) in which the same alleged disclaimer became the basis for the Wolfbergs' counterclaim against Greenberg in that case. An advisory jury empaneled in Case #5 specifically found that no agreement to make a disclaimer had been made by Greenberg. The Wolfbergs were forced by operation of preclusion to dismiss their claims in Case #2 or fall to a motion for summary judgment.

Case #3

On December 3, 1986, Predicate Case #3 styled *Carolyn Wolfberg v. Robert I. Greenberg, Trustee, Maynard Greenberg, Trustee, Rose Greenberg, Trustee and Robert I.*

Greenberg, individually, Case No. CJ-86-12734 was filed in the District Court of Oklahoma County, Oklahoma, seeking an accounting, removal of trustees, dissolution of the trust and distribution of property. The lawsuit alleged breach of fiduciary duties, and sought punitive damages in excess of $10,000,000 against Robert Greenberg in his individual capacity. The trial court allowed an audit of the trust's records by the Wolfbergs' accountants. Unable to find evidence of misconduct on the part of any of the trustees and faced with a hearing on a motion for summary judgment on September 18, 1987, the action was dismissed without prejudice September 17, 1987.[3] Because the Wolfbergs believed Greenberg had a "hometown advantage" and believed the judge was not favorable, the claim was sent to Wolfberg's Kansas lawyers for refiling and became Case #4. App. 20a.

Case #4

Filed on September 16, 1988 (one day before it would have been barred by the statute of limitations) in the District Court of Sedgwick County, Kansas, this revival of Case #3, styled *Carolyn Greenberg Wolfberg, Beneficiary Under the Mal Greenberg Testamentary Trust v. Robert I Greenberg, Maynard Greenberg, and Rose Greenberg, Co-Trustees Under the Mal Greenberg Testamentary Trust, Robert*

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[3] In his denial of the Wolfbergs' post-trial motions, Judge Alley specifically noted that Case #3 was "particularly reprehensible because defendants were clearly pleading a case without an evidentiary basis." Petition at 25a.

I. Greenberg, Beneficiary Under the Mal Greenberg Testamentary Trust; and Rose Greenberg, Beneficiary Under the Mal Greenberg Testamentary Trust, sought to remove the trustees of Carolyn's father's testamentary trust on the basis of alleged hostility toward her.

Although the only relief sought was removal of the trustees, the motivating force, as in Case #3, was the hope of replacing existing trustees with new trustees who would be willing to forgive or discount the Trust's judgment on the note against Service Business Forms (obtained by the Trust in Case #5) and agree to relieve Carolyn's anticipated share of her father's estate from restrictions imposed by the trust. Wolfberg also sought to use this litigation as part of a business strategy to force the sale of a building known as the "Meade Avenue Building," owned by the Trust, at a discount price.

Ruling on the issue of hostility by the trustees as alleged by Carolyn Wolfberg, the trial court specifically found no hostility by the trustees toward Mrs. Wolfberg. To the contrary, the Court declared that any hostility which might exist was hostility by Laurance Wolfberg toward Greenberg. App. 17a.

Case #5

Predicate Case #5 was initially brought as an action by the trustees of the Mal Greenberg Testamentary Trust against Service Business Forms. The trust sought to enforce payment of the note which Service had executed in payment for the purchase of its remaining stock when

acquired by the Wolfbergs in 1982. Styled *Robert I. Greenberg, et al. v. Service Business Forms Industries, Inc. and Service Computer Forms Industries, Inc.*, this lawsuit became the fifth predicate action when the Wolfbergs caused a counterclaim to be filed against Robert Greenberg alleging as in Case #2 that Greenberg had fraudulently agreed to disclaim his share of his father's estate and to execute a disclaimer as to all of his mother's jewelry.[4] The counterclaim sought to compel Greenberg to execute the disclaimers. Partial summary judgment was granted to the trustees on the note, and the jury found for Greenberg on the counterclaim. The Court of Appeals for the Tenth Circuit affirmed, and this Court denied certiorari in January, 1990.

THE PROCEEDINGS BELOW

I. THE ACTUAL DAMAGES AWARDED AT TRIAL

Petitioners' lawyers attempt to give the impression that Greenberg only sustained $34,000 in "out-of-pocket" damages for legal fees throughout this succession of cases. This overlooks the fact that Greenberg had recovered his attorneys' fees and expenses by court order in predicate Case #5 and that the Mal Greenberg Trust paid additional litigation fees. Although Greenberg's share of

[4] Although the Wolfbergs' Petition for Certiorari states "[n]either Mr. Wolfberg nor Mrs. Wolfberg was a party to this case" (Petition at p. 4), no court which has reviewed these facts has had any difficulty finding that the counterclaim was caused to be brought by the Wolfbergs, and was directed at Robert Greenberg.

the trust was thus diminished, he did not seek to recover that loss. More importantly, the jury heard evidence of the emotional distress, anxiety and fear exacted upon Greenberg by the succession of lawsuits which sought millions in punitive damages from him. Petition at 54a. If the Wolfbergs had prevailed on any of their claims, the results would have been devastating to Greenberg. In addition, the jury heard evidence of a lost business opportunity worth $250,000 in which Greenberg was unable to participate because of the overwhelming effect of the litigation on his psyche and his consequent inability to focus on his business. Petition at 56a-57a.

The argument that Greenberg's damages were limited to his out-of-pocket loss is nothing more than legal gamesmanship and is out of place in proceedings before this Court. The Court should note arguments characterizing the Wolfbergs' conduct as a mere family feud and Greenberg's damages as $34,000 out-of-pocket expense are made by lawyers who were not involved in any of the serial predicate litigation, trial of the subject case in the United States District Court for the Western District of Oklahoma, the appeal to the United States Court of Appeals for the Tenth Circuit or the questions certified to the Oklahoma Supreme Court.

II. THE PUNITIVE DAMAGE AWARD

At the close of evidence, pursuant to the procedure dictated by Oklahoma's punitive damage statute, 23 Okla.Stat.tit. § 9, Judge Alley specifically found the jury had been presented evidence sufficient to justify an instruction on punitive damages, App. 22a, and further

found ample evidence to justify lifting the cap on punitive damages. As Judge Alley explained:

> The jury has been presented clear and convincing evidence that the lawsuits were oppressive. They could conclude that false testimony was given in those cases which would constitute a species of fraud. And they have a great deal of evidence, as is even conceded by Mr. Barnes in his brief, that what activated these lawsuits was malice.

App. 22a. In his Order denying Petitioners' Motion for Judgment Notwithstanding the Verdict, For Certification To The Oklahoma Supreme Court, Motion For New Trial Or For Remittitur Of Damages, Judge Alley again had occasion to address the sufficiency of evidence to support the punitive damage award and, as Petitioners concede, he found nothing about the award objectionable considering the evidence of the Defendants' net worth. Petition at 27a.

The evidence of the Wolfbergs' net worth was from a financial statement prepared by the Wolfbergs which showed the Wolfbergs had a net worth of over $23,000,000 in 1987 (during which time four of the five lawsuits against Greenberg were pending). App. 23a. In addition, Laurance Wolfberg testified that after 1987, the Wolfbergs had sold real estate for $22,000,000 which they had valued in their financial statement as being worth $13,000,000. App. 25a. Wolfberg also testified that as of 1990, his pre-tax income was over $1,000,000 per year. App. 26a.

Although they had the opportunity to controvert this evidence at trial, the accuracy of their own statements

was unchallenged.[5] Judge Alley correctly found the punitive damage award appropriate.

The Court of Appeals for the Tenth Circuit likewise found nothing objectionable about the actual and punitive damage awards, despite the fact that Petitioners raised both the issue of disproportionality and the supposed unconstitutionality of Oklahoma's punitive damage statute. Contrary to Petitioners' suggestions in their brief, the Tenth Circuit squarely addressed both issues, and found the damage award supported by both the law and evidence.[6]

In sum, the damages awarded by the jury were based upon abundant evidence of the Wolfberg's malice toward Greenberg, obvious evidence of their repetitively litigious behavior, and clear evidence of their wealth. The jury awarded what damage they felt was appropriate based upon this evidence, and no court which has reviewed that evidence has disagreed.

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[5] In their Petition, the Wolfbergs now attempt to offer an alternate figure for their net worth. Petition at 13. This evidence was never offered at trial.

[6] Nor did the Tenth Circuit take issue with Greenberg's tort causes of action. The Tenth Circuit did acknowledge that Oklahoma did not have precedent regarding successive civil proceedings. The Court of Appeals certified four specific questions to the Oklahoma Supreme Court regarding this issue. In response to those questions, the Oklahoma Supreme Court clearly indicated that such a theory was recognized in Oklahoma. Petition at 29a. In writing its opinion based upon this guidance, the Court of Appeals held that Greenberg had indeed made his case under Oklahoma law. Petition at 1a.

REASONS FOR DENYING THE WRIT

1. THIS CASE BEARS NO RESEMBLANCE TO *BMW*.

Having failed to convince the jury, the trial court and the Tenth Circuit that they did not file the five lawsuits with malice and without probable cause, the Wolfbergs now seek to avoid the jury verdict on the basis that "issues here are substantially similar to those presented in *BMW of North America, Inc. v. Gore*, 644 So.2d 619 (Ala. 1994), *cert. granted*, 115 S.Ct. 932 (1995) (No. 94-896)." In making this argument, Petitioners cite to *Pacific Mutual Life Ins. Co. v. Haslip* 499 U.S. 1 (1991), *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994), *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), and the Petition for Certiorari in *BMW*. However, none of these cases support the argument that the jury verdict is flawed. If anything, a comparison of these cases with the evidence presented by Greenberg makes it clear the jury was correct in its decision.

First, the Tenth Circuit opinion holds that the Wolfbergs do not have any basis for further review based on due process, despite the fact that their counsel made due process arguments based on *Haslip* both in their appeal briefs and at oral argument. The Court of Appeals squarely addressed that issue and declared:

> The award of punitive damages is challenged as excessive considering the defendants' net worth. We do not find in the record a basis for this argument of defendants. The Oklahoma statute does not violate due process as the Appellants urge. We have considered the statute or a similar statute in prior cases. *See John A. Henry & Co.*

Ltd. v. T.G.&Y. Stores Co., 941 F.2d 1068 (10th Cir.), and *Silkwood v. Kerr-McGee*, 769 F.2d 1451 (10th Cir.).

Petition at 17a. Therefore, not only did the Tenth Circuit declare that Oklahoma's statute satisfies due process, but it reiterated that the Wolfbergs themselves were indeed afforded due process based on the record in this case. In fact, the trial court was required to and did make an evaluation of the Wolfbergs' "wrong" prior to instructing on the issue. App. 22a. Thereafter, he reviewed the award in response to the Wolfbergs' post-trial motions. Petition at 27a.

The *Honda* decision does not suggest any basis for review of this case. In *Honda*, this court declared unconstitutional an Oregon statute which specifically prohibited judicial review of punitive damages awarded by a jury. 114 S.Ct. 2331 at 2342. In so doing, this court pointed out that "every other State in the Union affords post-verdict judicial review of the amount of a punitive damages award." *Id.* at 2338. Such is the case with Oklahoma's punitive damages statute, 23 Okla.Stat.tit., § 9, and this award has been reviewed, not only by the trial court when ruling on the Wolfbergs' post-trial motions, but also by the Tenth Circuit. In *TXO*, this court upheld as constitutional a jury award of $19,000 actual damages and $10,000,000 punitive damages in a lawsuit where the defendant was found to have intentionally and knowingly brought a declaratory judgment action without cause and to further an improper collateral business scheme. 133 S.Ct. 2711 at 2722. In so doing, this court rejected the notion of any bright-line test of constitutionality for awards of punitive damages, and instead

chose to examine the potential of harm which could have resulted from the defendants' behavior. *Id.* As this court explained:

> The punitive damage award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, and petitioner's wealth, we are not persuaded that the award was "so grossly excessive" as to be beyond the power of the State to allow.

Id. at 2722-23. Like the defendants in *TXO*, the Wolfbergs intentionally and knowingly brought unfounded lawsuits to achieve an improper collateral purpose. Those lawsuits sought millions of dollars in punitive damages against Greenberg personally. The potential harm to Greenberg, had they once succeeded, would have been his emotional and financial destruction. The actual harm, not only financially but emotionally as he faced this onslaught, was significant. *TXO* certainly provides no basis for further review of this award.

A comparison of the facts in this case to those in *BMW* provides no basis for granting the Wolfbergs further review. In *BMW*, the jury awarded $4,000 actual damages and $4,000,000 in punitive damages based on the failure of an auto manufacturer and an auto distributor to disclose that cars had been repainted subsequent to manufacture. On appeal, the Supreme Court of Alabama ordered a reduction of the punitive damage award to $2,000,000, thereby reducing the ratio of punitive damages from 1000 to 1 to 500 to 1. 646 So.2d 619 at 629. In

that case it appeared that the jury had based the punitive damage award, at the suggestion of plaintiff's counsel, on evidence that defendants had similarly failed to disclose repainting on nearly 1000 cars total. Additionally, it appeared that only 11 to 14 of those cars were sold in Alabama, where the case was prosecuted.

The ratio of actual damages to punitive damages in the present case is not even remotely similar to those at issue in *BMW*. There is ample evidence to support the actual damage award of $284,000, and the record is replete with evidence of the Wolfbergs' malice toward Robert Greenberg, evidence sufficient to justify the punitive damages, especially considering the uncontroverted evidence of the Wolfbergs' wealth. Nor is the extraterritoriality issue present here: even the one case which was filed in Kansas was designed to cause, and did cause, damage to Robert Greenberg and his interests in Oklahoma. *BMW* offers no support to the Wolfbergs.

There is no reason to hold this case in abeyance pending a decision in *BMW*. Since the filing of the petition for writ of certiorari in *BMW*, this court has denied certiorari in several punitive damage cases. *See Berj Boyajian v. Olfacto-Labs*, 63 USLW 3756 (U.S. May 30, 1995) (No. 94-1636); *AJ & AJ Servicing, Inc. v. Tudor Assoc., Ltd.*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1380); *M. Harold Ezzone v. Willis M. Hansen*, 63 USLW 3817 (U.S. May 15, 1995) (No. 94-1513); *Ferrellgas, Inc. v. Clay*, 115 S.Ct. 1102 (1995) (No. 94-1066); *Dow Corning Corp. v. Hopkins*, 115 S.Ct. 734 (1995) (No. 94-861); *Figgie v. Moskovitz*, 115 S.Ct. 668 (1994) (No. 94-781). Because this Court has declared punitive damages are not in and of themselves unconstitutional, it would unduly protract

this litigation to hold it in abeyance pending this Court's decision in *BMW*.

2. NOTHING IN THE INSTANT CASE JUSTIFIES REVISITING THE CONSTITUTIONALITY OF PUNITIVE DAMAGES.

The Wolfbergs seek to characterize their verdict as "substantially similar" to that in *BMW*, where the ratio of punitive damages to actual damages was originally 1000 to 1 and was reduced to 500 to 1. At the same time, they seek to portray the damage awarded to Greenberg as being a relation between "$2,250,000 in punitive damages as compared to $34,000 in out-of-pocket costs." This is both disingenuous and inaccurate. Robert Greenberg was awarded $284,000 in actual damages against Laurance and Carolyn Wolfberg, who were found to be jointly and severally liable for this damage. The relationship that must be considered by this Court is the amount of the punitive award compared to the magnitude of the wrong. On that basis, the award is fully justified. In addition, when the punitive damages assessed against each is compared to this accurate actual damage figure, the ratio for Laurance Wolfberg becomes at most slightly over 6 to 1, and the ratio for Carolyn is less than 2 to 1. Given the evidence of malice with which the jury was presented, the potential for harm to Robert Greenberg which could have resulted from the five groundless lawsuits, the actual harm which he suffered, and the wealth of the Wolfbergs, these are reasonable ratios which do not offend due process.

The Wolfbergs are being similarly deceptive in their argument that "punitive damages were awarded for conduct never previously recognized as tortious under Oklahoma law." Petition at 12. Malicious prosecution and abuse of process had been recognized as torts in Oklahoma for decades prior to the Wolfbergs' bringing any of these lawsuits. Certainly their lawyers, who repeatedly warned the Wolfbergs that there was no basis for bringing the actions and continuing groundless appeals, were aware of this.[7] Because the Wolfbergs were engaging in behavior recognized as tortious *each* time they maliciously prosecuted or abused process, they surely cannot be heard to complain merely because together, they had the malice and the wherewithal to do so *ten* times.[8]

The Wolfbergs' argument that this award is a dangerous anomaly under Oklahoma is also strained. They compare this action, based on a series of five lawsuits spanning a five year period with millions of dollars potentially at stake, with cases like *Moore v. Target Stores, Inc.*, 571 P.2d 1236 (Okl.App. 1977),[9] where a woman was

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[7] Greenberg produced several such letters, obtained from the files of various Wolfberg counsel, which were exhibits at trial. App. 27a.

[8] The jury specifically found that each predicate case constituted both malicious prosecution and abuse of process. If anything, the fact that this action was brought based on five predicate lawsuits heightened Greenberg's burden both at trial and on appeal, including certified questions to the Oklahoma Supreme Court.

[9] Significantly, the Oklahoma Court of Appeals observed in *Moore* that "an exemplary damage verdict is peculiarly within the province of the jury, and will not be casually interfered with on grounds of excessiveness." 571 P.2d at 1241.

arrested for shoplifting and detained for part of an afternoon. The fact is, this case represents a rare situation – as is evidenced by the certification of questions to the Oklahoma Supreme Court – and there are no analogous cases to which it can be readily compared. Nonetheless, such tortious behavior should not go unpunished.[10]

As for the Wolfbergs' argument that this award is not analogous to criminal fines for barratry, it is notable that the Oklahoma Statutes allow civil tort actions for both malicious prosecution and abuse of process, and punitive damages in cases where malice is evident.[11] In this case, both the trial court and the Tenth Circuit were aided by Oklahoma statutes and common law precedent, and the Tenth Circuit had the guidance of the Oklahoma Supreme Court on certified questions. Certainly this dispatched the duty of federal courts under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1939).

Finally, the Wolfbergs attempt to in effect argue that the punitive damage award is improper because "they are

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[10] Punitive damages serve a deterrent function not only as an example to society, but also to deter the defendants from continuing to file groundless lawsuits. As Judge Alley noted in his denial of the Wolfbergs' post-trial motions, the punitive damage award in this case had to be large in order to prevent them from repeating their conduct. Petition at 27a.

[11] This Court should similarly disregard the Wolfbergs' comment that there is no precedent for awarding punitive damages for abuse of process. The Oklahoma Supreme Court, in answering the certified questions, had ample opportunity to review the tort of abuse of process, and apparently had no quarrel with classification of abuse of process as a civil tort for which punitive damages are proper.

not actually as wealthy as they represented themselves to be on their financial statement in 1987." This argument is specious. First, the evidence submitted at trial consisted of a (1) financial statement which they themselves prepared (App. 23a); (2) testimony by Laurance Wolfberg as to his pre-tax annual income of over $1,000,000 (App. 25a); and (3) testimony by Laurance Wolfberg as to 22 million dollars received from the sale of his home on Kahala Boulevard in Honolulu (App. 25a). This country's judicial system was not designed to allow a rich man and his wife to misuse the courts to intentionally and wrongfully destroy another person. Litigation tactics calculated to victimize the opponent should not be condoned.

The Wolfbergs had their day in court – several times. They were made fully aware of the potential consequences of their wrongful acts. If ever a case merited a punitive damage award, this case does. The Wolfbergs are not penitent over what they attempted to do and their arguments that punitive damages should be held unconstitutional in this case seeks to beggar the purpose for such awards.

CONCLUSION

The punitive damage award in this case is neither so large, either in amount or in proportion to the $284,000 actual damage award, nor so disproportionate to the wealth of the defendants, as to offend due process. The Wolfbergs' efforts to analogize to *BMW* are a cynical smokescreen, created to further prolong this litigation. The trial court and the Tenth Circuit Court of Appeals

have reviewed both the merits of the case and the jury verdict based upon the evidence presented, and have found nothing wrong.

The Respondent respectfully objects to the Petition for Certiorari and requests the same be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LAURENCE B. WOLFBERG, Plaintiff	)	
vs.	)	No. CIV-86-2441-C
ROBERT I. GREENBERG, Defendant	)	

MEMORANDUM OPINION

(Filed Dec. 17, 1987)

Parties and counsel in this case, having consented to proceed before a United States Magistrate, 28 U.S.C. §636(c), appeared for nonjury trial before the undersigned on November 17 and 18, 1987. Testimony and exhibits were offered and admitted, and the Court has now received supplemental briefs and proposed findings of fact and conclusions of law from both counsel. Having duly considered the evidence and the law, the Court enters the following memorandum opinion, which shall constitute its findings of facts and conclusions of law.

The parties in this case are brothers-in-law who formed a partnership for the purpose of exploring and developing oil and gas properties beginning in 1975. The partnership was known as Green Wolf Oil Company. Greenberg (defendant) and Wolfberg's (plaintiff's) wife are the only children of Mal Greenberg, who owned considerable property at his death, a piece of which formed the original basis for Green Wolf Oil Company.

Originally, at the outset of Green Wolf, Wolfberg resided in Kansas and also operated a family business known as Service Business Forms in Wichita. At the same time, Greenberg resided in Oklahoma City and also operated a family business known as Seiberling Latex Products, Inc. Relations between the brothers-in-law, both business and personal, were always excellent until the early 1980's. Mal Greenberg had wanted each to be in business with the other, and had started each in the family business. In 1969, a parent or holding company was created, Service Computer Forms, which wholly owned both Service Business Forms and Seiberling. Wolfberg and Greenberg owned equal shares, and Mal (later his testamentary trust) owned a small percentage. In any event, the family businesses, both those mentioned above and other ventures, were profitable and amicably run.

In 1979, Green Wolf began charging a $300-per-well administrative charge shared, with respect to each well, by the joint interest owners, including Green Wolf. This charge was neither uncommon nor excessive, and has not been raised since. In 1980-81, Wolfberg moved from Wichita to Hawaii, then to Oklahoma City and back to Hawaii. He operated Service Business Forms from each new residence. Seiberling Latex Products was liquidated, resulting in considerable cash gain, which was held by Service Computer Forms, the parent company.

In the spring of 1981, Greenberg was approached by an uncle, Robert Zeligson, whose business acumen and judgment Greenberg trusted and admired, about forming a well servicing company in which Greenberg, Zeligson's son, and Griffith, who had experience in well servicing, would be principals. The company would be known as

Griffith Resources, and Zeligson wanted Greenberg to serve as chief executive and financial officer. Greenberg was extremely interested in the prospect, but declined to participate unless Zeligson would allow a 50/50 participation by Wolfberg. Because of the Green Wolf partnership, both men considered all oil and gas ventures (and apparently others, as well) to require joint participation or none at all. Zeligson agreed to the participation of Wolfberg only if Wolfberg had no active role in management, and his ownership share was held in trust. Wolfberg agreed to this proposal, and the joint interest of Wolfberg and Greenberg was placed in the Mal Greenberg Testamentary Trust, and later, at Wolfberg's insistence, a different trust was created to hold the Griffith interest. There was nothing, then or later, about the ownership or formation of Griffith Resources, Inc., that was kept from Wolfberg or done without both his knowledge and approval. Wolfberg did not appreciate and in fact resented being left out of management, and the decision by Zeligson to exclude him rankled, both then and now. It was apparently over the formation of Griffith Resources that the relationship of the brothers-in-law started to crumble.

In October, 1982, it was decided and agreed between the brothers-in-law that their interests should be separated, to the extent practicable and possible. Wolfberg purchased Greenberg's share of Service Computer Forms for the cash generated by the sale of Seiberling Latex Products. Wolfberg purchased the share of the Mal Greenberg Testamentary Trust in Service Computer Forms by executing a note to the Trust. The parties maintained their partnership in Green Wolf, but agreed that Greenberg

would run the partnership, as well as supervise their joint interest in Griffith Resources and the family trusts through a new company he would form to be known as Alpha Management Company. Alpha Management, from its inception, collected the $300-per-well charge from participating owners, including Green Wolf.

In 1983, after two productive and profitable years, Griffith Resources experienced the same decline in drilling and well activity with which the entire industry was faced. In the spring of 1983, the First National Bank, from which Griffith Resources had borrowed approximately four million dollars, required a significant reduction of debt before Griffith's loan would be renewed. Griffith was faced with the choice of putting capital in the neighborhood of one million dollars into the company, or face foreclosure of the Bank's interest. Greenberg had personally guaranteed $500,000 of this debt. Wolfberg and Greenberg met in Hawaii about this time, and discussed the need to meet the cash call. Following the meeting, Wolfberg wrote a letter to Greenberg proposing that their share of the debt reduction be paid by borrowing through Green Wolf and loaning the money to Griffith Resources. This was ultimately done, and the bank's requirements were satisfied. The note from Griffith Resources to Green Wolf was later subordinated to the bank's note, as a requirement for a later renewal. Griffith Resources continues to be a viable if not profitable entity, and to reduce its debt.

During this time, Wolfberg suffered extreme health problems, having had cancer, resulting in a lengthy hospital stay and recuperation, and having suffered severe mental problems in the winter of 1984 and spring of 1985,

also resulting in hospitalization and recuperation. In December, 1984, following a telephone conversation on the same subject, Greenberg, by letter, announced his withdrawal from the Green Wolf partnership. Greenberg requested that Wolfberg make any suggestions for dissolution he thought appropriate, execute documents designed to facilitate the transfer of ownership. Wolfberg never responded to Greenberg's requests, nor corresponded or communicated with Greenberg in any way, from that point on, concerning the dissolution, management, or operation of Green Wolf.

Greenberg continued to operate Green Wolf's wells through Alpha Management, making a capital distribution to the partners in May, 1985, and August, 1985. The partnership debt, originally expected to be paid in February, 1986, was not paid until April, 1987. The Partnership note was renewed by Greenberg in August, 1985, without the knowledge or permission of Wolfberg.

Following institution of this suit, an audit of partnership accounts was undertaken by Wolfberg's representatives. Following the audit, Wolfberg's allegations of wrongdoing are: (1) that the receipt by Alpha Management of the $300-per-well operating charge from Green Wolf resulted in a profit to Alpha and thus Greenberg to which he was not entitled, the theory of recovery being based on either breach of agreement or breach of fiduciary duty or both; (2) that the $400,000 loaned by Green Wolf to Griffith Resources should have been a debt of Greenberg rather than of Green Wolf, because Greenberg misrepresented the circumstances of the transaction; and (3) that the renewal of the Green Wolf note in August,

1985, after the partnership ceased, was a wrongful act on Greenberg's part.

The $400,000 borrowed by Green Wolf was for the benefit of Griffith Resources, Inc., and with it and $600,000 obtained from another principal, Griffith Resources' indebtedness with First National Bank was reduced. This debt reduction was a requirement of the Bank before it would renew or extend existing notes. Failure to make this payment would have resulted in foreclosure of the bank's interest and the complete collapse of Griffith Resources. The Court finds that contrary to plaintiff's allegation, the purpose of the one million dollar payment was not to relieve Greenberg's liability on his personal guaranty, but to prevent foreclosure of the bank's interest. The Court finds that Wolfberg, plaintiff herein, was fully aware of the purpose of the debt reduction. The loan of $400,000 from Green Wolf to Griffith Resources was his suggestion and for the purpose of bailing out their joint faltering investment, to protect his brother-in-law from liability. The Court finds that Wolfberg knew that Greenberg was not personally liable for the entire four million dollar debt to the bank, or for the one million dollar cash call, and further knew that the purpose of the cash infusion into Griffith was to keep it afloat in hopes of better days soon in the oil industry. The Court finds that Wolfberg's testimony concerning the circumstances surrounding the Griffith Resources note is incredible and that the unbelievability of Wolfberg's testimony in this regard taints his credibility with respect to every other issue. Wolfberg is an experienced investor, entrepreneur, and, by his own description, a deal maker, and his purported misunderstandings concerning the

nature of his ownership in Griffith Resources, his liability for a cash call, Greenberg's liability, and the purpose of the debt reduction are completely unbelievable, especially considering his letter to defendant following their meeting.

In short, the Court finds no breach of fiduciary duty on the part of Greenberg with respect to the Griffith Resources note. The Court finds that Wolfberg had no misunderstanding, but, if in fact he did, it was not due to any misrepresentation by Greenberg.

With respect to Wolfberg's claim that Greenberg wrongfully renewed a partnership debt after dissolution of the partnership, the Court finds no wrongful conduct on the Part of defendant. It is required, as part of his fiduciary duty, that defendant wind up the partnership affairs in a reasonable time. Following defendant's letter of December 19, 1984, wherein he announced his intention to withdraw from the partnership, defendant continued to operate the partnership affairs for the purpose of retiring the partnership debt. Capital distributions were made to the partners twice following defendant's letter announcing his withdrawal. It is plaintiff's contention that those capital distributions should have been used to reduce the debt and that defendant's failure to retire the debt earlier, and his renewal of the partnership note, both constitute a breach of fiduciary duty. Plaintiff's claim must fail for two reasons. First, he can show no damage inuring to him as a result of the extension of the partnership debt or the distribution of capital to the partners. Both were to his benefit, as he received cash equal to that of defendant in the capital distribution. Plaintiff cannot be heard to now complain of capital distributions when

he accepted them when made without protest or suggestion to the contrary, or any communication whatsoever concerning the management or operation of Green Wolf or the retirement of its debt. As Green Wolf continued to profit despite declining oil revenues as a result of the renewal of the partnership note, regardless of the benefit to plaintiff, the Court finds that in renewing the note defendant acted within his duties as a responsible and cautious manager. Plaintiff can claim no breach of fiduciary duty when the actions taken by defendant were to the benefit of plaintiff and appear to be reasonable and prudent in the operation of the partnership.

The final issue for decision is the propriety of Greenberg's company, Alpha Management, charging Green Wolf its share of the $300.00 per month per well administrative charge. As mentioned above, Green Wolf, itself, had charged $300.00 per month per well to its investors since 1979. The amount was reasonable. The charge is designed to cover the administrative and accounting costs incurred to operate each well. Although Green Wolf billed itself for its proportionate share of the $300.00 monthly fee, it never paid its share until Alpha Management took over the operation of the wells. When the parties attempted to split their joint interests in 1982, but maintained their partnership in Green Wolf, Greenberg took over management of Green Wolf through his wholly-owned company, Alpha Management. There was no formal agreement concerning the $300.00 charge, but Alpha collected it from Green Wolf from the beginning. In his letter of resignation from the partnership in December, 1984, Greenberg indicated his intent to continue operating the Green Wolf properties through Alpha, further

providing that any "benefits received from our other partners would continue to be shared equally between us." (Plaintiff's Exhibit 2) Plaintiff devoted much time at trial to attempting to prove that the income to Alpha from the monthly charge was in excess of its expenses reasonably related to operating the Green Wolf wells, and that therefore defendant had breached his fiduciary duty.

Plaintiff cites law standing for the proposition that one partner may not make a profit for himself individually out of the partnership business. Uniform Partnership Act (OKLA.STAT. tit. 54, §221(1); KAN.STAT.ANN. §56-321 (1983)); *Phillips v. Kula 200, Wick Realty, Inc.*, 2 Haw.App. 206, 629 P.2d 119 (Haw.Ct.App. 1981). Plaintiff further cites law standing for the proposition that a partner, occupying a fiduciary position with respect to his other partners, owes a higher and greater duty to a partner than to one with whom he deals at arms' length. *In Re Longhorn Securities Litigation*, 573 F.Supp. 255 (W.D. Okla. 1983); *Oklahoma Company v. O'Neil*, 440 P.2d 978, 984 (Okla. 1968). While plaintiff concludes that these authorities support the proposition that defendant breached his fiduciary duty by profiting through Alpha Management, from the well charge paid by Green Wolf, plaintiff does not explain how he himself can be exempted from the duty to treat a partner fairly which he would impose upon defendant. In this case, plaintiff withdrew completely from partnership affairs as early as 1982, living in Hawaii and operating Service Computer Forms, all other family shares of which he had purchased for himself. He left the complete day-to-day operation and management of Green Wolf to the defendant, and refused to communicate in any way with defendant regarding the dissolution

of the partnership. When Alpha Management took over the operation of Green Wolf properties in 1982, it commenced paying the salaries of employees, formerly paid by family businesses, whose duties still involved family interests (including plaintiff's) other than Green Wolf. Alpha assumed the cost of office space, employee salaries, and other legitimate business expenses which plaintiff would otherwise have had to pay for individually, to protect his share of the family interests being run by Alpha. The testimony of Greenberg was that he never took a salary from either Alpha or Green Wolf and, in fact, Alpha never made a profit and required his capital infusion to continue operations. Additionally, Alpha assumed the risk of loss if any well had required expenses in excess of the monthly fee. While plaintiff claims that he never knew Alpha was charging this fee to Green Wolf, it is through his own neglect of partnership affairs that he did not know, if in fact he did not. No effort was made by Alpha or Greenberg to hide the charge from Wolfberg, and defendant's letter assuring that benefits from other partners would continue to be shared clearly stated the status quo would be maintained. The monthly charge had been collected from Green Wolf for two years when that letter was written and no agreement to the contrary is evidenced by the letter. The Court finds that no agreement existed that Alpha would not charge Green Wolf its share of the monthly fee. The payment by Green Wolf to Alpha prevented plaintiff's personal liability for management fees, the fee itself was reasonable, and neither Alpha nor Greenberg made a profit from the monthly charge to Green Wolf. The Court thus further finds that the imposition of the monthly well

charge against Green Wolf was not a breach of fiduciary duty.

In accordance with the foregoing, the Court finds that plaintiff has failed to sustain his burden of proof on any of his alternative theories of recovery. Plaintiff is, however, as agreed by all parties, entitled to a dissolution of the partnership, and conveyances to accomplish that end have apparently been agreed upon by the parties. It is therefore the order and judgment of this Court that plaintiff have and recover nothing against defendant by way of his claims of breach of agreement or breach of fiduciary duty, and that the parties execute any deeds, conveyances, and agreements necessary to achieve full dissolution of the Green Wolf partnership. A judgment shall enter accordingly.

IT IT SO ORDERED this 17 day of December, 1987.

/s/ Robin J Cauthron
ROBIN J. CAUTHRON
UNITED STATES MAGISTRATE

APPENDIX B

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
WICHITA, KANSAS
67203

ROBERT C. HELSEL
JUDGE

January 25, 1990

Sherwood, Hensley, Harper & Gregory
Attorneys at Law
Riverfront Place – 833 North Waco
P.O. Box 830
Wichita, Kansas 67201

Attention: Kurt Harper

Adams, Jones, Robinson and Malone, Chartered
P.O. Box 1034
600 Market Centre
155 No. Market
Wichita, Kansas 67201-1034

Attention: John Seeber

Re: Wolfberg vs. Greenberg, etal
88 C 3346

Gentlemen:

The Court after hearing the evidence and argument of counsel, and upon being fully advised in the premises makes the following Findings of Fact, to wit:

1. Mal Greenberg, the decedent was married to Rose Greenberg and had two children, Carolyn Greenberg Wolfberg the plaintiff in this action, and Robert Greenberg one of the defendants in this action.

2. Mal Greenberg died July 23, 1971 survived by his wife and his two children. Mal Greenberg in his will made certain specific bequests and then created what is commonly known as a Marital Deduction Trust for the use of his wife, Rose Greenberg. The decedent further provided in Article V of his will that after the payment of specific bequests and the establishment of the Marital Deduction Trust for the use and benefit of his widow, that the balance of his estate should go to his wife, Rose Greenberg and to his son Robert I. Greenberg and to a nephew, Maynard Greenberg as trustees, and the trust to be held for the benefit of his wife, his children and their issue.

3. This trust provided that the net income of a trust should be paid to Rose Greenberg in quarter-annual or more frequent installments, as long as she should live. The trust further provided that the trustees could disperse the principle of the trust to Rose Greenberg as might be necessary or appropriate to provide for her maintenance, welfare, comfort or to support or to meet an emergency or extra ordinary expense.

4. Upon the death of Rose Greenberg, the trustees were to divide the trust estate into two equal parts. One part which would be forthwith conveyed to Robert I. Greenberg, if living or if he is not living, then in trust for his issue as provided in the will.

5. The remaining part of the trust was to be held in trust for the benefit of his daughter, Carolyn Greenberg Wolfberg. The trustees were to remit the net income of the trust to her in quarter-annual or more frequent installments for as long as she should live. The trustees

were authorized to disperse from the principle of the trust such amount of the principle as the trustees should consider necessary for the health, support, and maintenance of his daughter or to meet any emergency affecting her or her family such as medical or dental care. Upon the death of Carolyn Greenberg Wolfberg, the principle was to be distributed as provided in the will.

6. The will of the decedent granted absolute discretion to the trustees and further provided that the beneficiary should not have the right or power to anticipate by assignment or otherwise any income or corpus given to such beneficiary by this instrument or any portion thereof.

7. The powers granted to the trustees gave the trustees unbridled and unlimited powers of discretion to do what they thought was best in the execution of their duties as trustees. It would appear from reading the will that the trustees have the power and discretion to do anything that the decedent could do if he were still alive.

8. Carolyn Greenberg Wolfberg is married to Laurence Wolfberg. For a number of years, Laurence Wolfberg has been suffering from a severe mental illness which has adversely affected his thinking concerning his father in law's estate. That Robert I. Greenberg in the fall of 1984 was summoned by his sister for help in a perceived financial crises which in fact did not exist to help her and her husband. That during this period of time Robert I. Greenberg went to the home of the plaintiff, Carolyn Greenberg Wolfberg and her husband in Honolulu, Hawaii and spent several days reviewing his sister and brother in law's financial condition.

9. Mr. and Mrs. Wolfberg had a friend one Marsha Stearn who is a realtor in Honolulu and who in fact had sold to Mr. and Mrs. Wolfberg their rather expensive home in Honolulu. One of the perceived problems in connection with the Wolfberg financial crises was the mortgage payments on their home. Mr. and Mrs. Wolfberg had authorized Mr. Greenberg to talk to Mrs. Stearn about the value of their home and the possibility of the sale of the home. Mr. Greenberg had an appointment on a day certain to have this conversation with Mrs. Stearn. The day before that appointment was to be kept Mrs. Stearn, Mr. Greenberg and Mr. and Mrs. Wolfberg had gone to dinner. After returning to the Wolfberg's from dinner Mr. Greenberg was talking to Mr. and Mrs. Stearn and at that time made inquiry as to the value and the saleability of their home.

10. This conversation between Robert I. Greenberg and Marsha Stearn created a violent outburst by Carolyn Greenberg Wolfberg wherein Mrs. Wolfberg verbally berated Robert Greenberg and was so mad as to almost be out of control.

11. Robert I. Greenberg made no response to this verbal abusive attack but advised Mr. and Mrs. Wolfberg that he thought that it was better that he not have anything to do with their financial affairs.

12. The Court finds that the verbal attack by Mrs. Wolfberg on her brother, Mr. Greenberg was completely unreasonable and without justification.

13. The Court further finds the Robert I. Greenberg is an intelligent, sensitive person who was deeply hurt by

his sister's unwarranted attack upon him and his credibility and that ever since said date, Mr. Greenberg has thought it best to avoid possible confrontations with his sister or his brother in law by not being at family gatherings where they might be.

14. Robert I. Greenberg did attempt to affect a reconciliation in early 1985 by offering to take his sister to dinner in Dallas, Texas but that Carolyn Greenberg Wolfberg rebuffed the attempt.

15. That Carolyn Greenberg Wolfberg has never made a request to the trustees of the Mal Greenberg Testamentary Trust for any money for herself from the trust.

16. That in November of 1984 the resources of the plaintiff, Carolyn Greenberg Wolfberg and of her husband, Laurence Wolfberg were substantial and included approximately one million dollars of pre-tax income a year together with the home in Honolulu which the plaintiff valued at ten to fifteen million dollars.

17. That Carolyn Greenberg Wolfberg has never requested a loan from the trustees of the Mal Greenberg Testamentary Trust.

18. Thereafter, Carolyn Greenberg Wolfberg and Laurence Wolfberg have instituted numerous law suits in state and federal court in Oklahoma against Robert I. Greenberg. That Mr. and Mrs. Wolfberg have lost all of these law suites [sic] and appeals to the Circuit Court of Appeals, Tenth Circuit.

19. That these law suits were precipitated by the trustees of the Mal Greenberg Testamentary Trust, calling

a promissory note which was delinquent. This note was in the principle amount of One Hundred and Two Thousand Dollars ($102,000.00) and was payable to the Mal Greenberg Testamentary Trust from Service Computer Forms Industries, Inc. which was a corporation owned by Mr. and Mrs. Wolfberg.

20. That the various cases filed by Mr. and Mrs. Wolfberg have been irritating to the trustees of the trust. That the trustees and especially Robert I. Greenberg have shown remarkable restraint in spite of provocations and have, in the opinion of the Court dealt properly with Mr. and Mrs. Wolfberg.

21. That all of the judgements in the Oklahoma litigation are final and are Res judicata.

22. That this action has been filed to remove the trustees of the Mal Greenberg testamentary trust because of alleged hostility by the trustee toward Carolyn Greenberg Wolfberg. The Court specifically finds that there is no hostility by the trustees toward Mrs. Wolfberg. That the hostility which might exist is hostility by Laurence Wolfberg toward his brother in law, Robert Greenberg which hostility has been precipitated by Mr. Wolfberg's mental illness, and which hostility has been apparently adopted by Mrs. Wolfberg.

23. That Rose Greenberg has not drawn the income which she is entitled to from the Mal Greenberg Testamentary Trust but has allowed a great amount of this income to remain with the trust and to be accumulated for the benefit of the ultimate beneficiaries of that trust

including Carolyn Greenberg Wolfberg. This is not hostility but is evidence of a concern of a mother for her daughter.

The Court makes the following Conclusions of Law, to wit:

1. Under the will of Mal Greenberg, deceased, there are two trusts one being the Rose Greenberg Marital Trust and the second the residual trust being the Mal Greenberg Testamentary Trust. There is only one beneficiary entitled to payments under those trusts at this time, to wit: Rose Greenberg, the widow of the decedent and one of the Co-Trustees of the two trusts. Rose Greenberg is entitled to all of the income from both trusts and so received payment of principle for certain purposes as set forth in the will.

2. There is no provision in the will of Mal Greenberg for Carolyn Greenberg Wolfberg so long as her mother is alive to receive either income or principle from either of the trusts created in the will of Mal Greenberg. Carolyn Greenberg Wolfberg will have no right to payment of income from the Mal Greenberg Testamentary Trust until after the death of Rose Greenberg.

3. The hostility of Carolyn Greenberg Wolfberg and Laurence Wolfberg toward the trustees of the Mal Greenberg Testamentary Trust and more especially towards Robert I. Greenberg is not grounds for removing the trustees of the trust from their position as established by the decedent in his will. The trustees in all instances as far as can be ascertained by the Court have acted properly and in the best interests of the beneficiary, Carolyn Greenberg Wolfberg.

4. No legal or factual basis has been shown by the plaintiff for removal of the trustees and the Court finds and holds for the defendants and against the plaintiff.

5. The removal of a trustee is a drastic action which should only be taken when the estate is actually in danger and the intervention is necessary to save trust property. This is especially true where the trustees are named by the settlor of the trust. There has been no evidence to justify such action by the Court.

I will ask Mr. Seeber to journalize this matter.

Respectfully yours,

/s/ Robert C. Helsel
Robert C. Helsel

District Judge-Div. 20

APPENDIX C

TEXT OF LETTER DATED SEPTEMBER 15, 1988 FROM COUNSEL TO LAURANCE B. WOLFBERG ADMITTED AS ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 94

* * *

Mr. and Mrs. Laurance B. Wolfberg
c/o Marriott Hotel
2151 Avenue of the Stars
Los Angeles, California 90067

Re: Carolyn Wolfberg – Trust

Dear Larry and Carolyn:

I have performed some preliminary research in regard to the possible statute of limitations claim that the trustees could assert against you in the above referenced matter.

As I stated to Larry over the telephone, if the lawsuit is not refiled by September 16, 1988, my preliminary research indicates that it is not entirely conclusive as to how the Kansas court would treat the Oklahoma statute of limitations discussed in our previous conversations. With this in mind, I believe that it is best to be as cautious as possible and try to obtain a filing in Kansas of at least a preliminary Petition that may be amended at a later date. However, as stated over the telephone, it is possible that a Kansas court would not apply the Oklahoma rule at all and the September 16th deadline may not make any difference, but that is a judgment decision that you must make.

As stated on several occasions, we will not be able to represent you on this matter in Kansas and that we will

not be able to help or do you any good with any refiling in Oklahoma. Larry, I believe you agree that the Kansas courts are the best place for this case, as Oklahoma courts allow the Greenbergs the "hometown" advantage. In fact, any refiling in Oklahoma to attempt to preserve any rights may present more problems on your behalf, as the case would probably do better in the neutral courts of Kansas. Further, it is very difficult, if not impossible for this firm to try to determine how to best help this situation, when the Dallas firm would be the firm to bring and maintain the trust action and is the firm presently taking care of that matter. Therefore, it is my recommendation to have the Dallas firm file at lest a preliminary Petition in the Kansas court by September 16, 1988 deadline, and then amend the Petition to include whatever causes of action they deem necessary or proper to bring before serving the Petition upon the trustees.

If you have any questions or comments, please do not hesitate to contact this me. [sic]

Very truly yours

s/ Clay C
J. Clay Christensen
For the Firm

APPENDIX D

EXCERPTS FROM TRIAL COURT'S RULING AS TO INSTRUCTION ON PUNITIVE DAMAGES

* * *

And that brings me to the last item of business today, the application 23 Oklahoma Statute, Section 9. Following the provisions of the statute, I find, after the evidence has been concluded, and from the record, and prior to the submission of the case to the jury, and outside the presence of the jury, that the jury has been presented clear and convincing evidence that the defendants are guilty of conduct evincing wanton disregard for the rights of others, oppression, fraud, and malice. The wanton disregard being the attempt to, and in some case successful attempts, to pursue litigation without any basis at all, to include appeals contrary to the advice of counsel.

* * *

The jury has been presented clear and convincing evidence that the lawsuits were oppressive. They could conclude that false testimony was given in those cases which would constitute a species of fraud. And they have a great deal of evidence, as is even conceded by Mr. Barnes in his brief, that what actuated these lawsuits was malice.

So the case is presented without any cap on punitive damages.

* * *

APPENDIX E

SERVICE COMPUTER FORMS INDUSTRIES INC.

Executive Offices:
4615 Kahala Avenue
Honolulu, Hawaii 96816

CONFIDENTIAL

LARRY WOLFBERG AND CAROLYN WOLFBERG

AND FAMILY PARTNERSHIP

May 1, 1987

ASSETS	
Cash on Hand & in Banks	$ 1,005,460
Money Fund & Savings	506,477
Accounts Receivable/SBF	1,055,360
Accounts Receivable/Bank	5,000,000
Securities	
U.S. Government Bonds (TIGR)	730,000
Other Investments & Contracts	
Griffith Resources (14%)	1
Miscellaneous Equities	1,150,000
Oil & Gas Investments	2,250,000
Real Estate	13,113,000
Personal Property	1,770,000
Insurance (Cash Value)	13,600
TOTAL ASSETS	$26,593,898

LIABILITIES	
Bills Payable	$ 4,500
Mortgages	3,068,832
Total Liabilities	$ 3,073,332
NEW WORTH	$23,520.566
TOTAL LIABILITIES & NET WORTH	$26,593,898

APPENDIX F

EXCERPTS OF TRIAL TESTIMONY OF LAURANCE B. WOLFBERG

* * *

THE COURT: The objection is overruled. Tell us how much you got for your house.

THE WITNESS: The gross amount was 22 million.

THE COURT: And did you have to discharge a mortgage, incidentally, as part of closing?

THE WITNESS: Yes, sir, I did.

THE COURT: And that would result in a deduction of what?

THE WITNESS: Well, it took the mortgages and all the bills and different things against it before we start considering tax consequences of about 16 million, I think.

* * *

Q From November '86 till today, what's your financial condition?

A Well, beginning of November '86 it – well, let's put it this way: Starting in November I was – I have been fortunate enough to improve my balance sheet and my holdings and my businesses since January 1986. And if you ask me specifically on November '86, I would have to take a look and and determine what my real worth, not what my net worth indicated.

Q Well, Mr. Wolfberg, in January of 1990 Judge Helsel found that you had pretax income of approximately one million dollars a year. Was that accurate?

A In 1990?

Q Yes.

A I believe that was accurate.

* * *

APPENDIX G

TEXT OF LETTER DATED SEPTEMBER 7, 1989 FROM COUNSEL TO LAURANCE B. WOLFBERG ADMITTED AS ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 65

* * *

Mr. Larry Wolfberg and Mrs. Carolyn Wolfberg
c/o Service Business Forms
815 E. 2nd St.
Wichita, Kansas 67202

Re: Carolyn Greenberg Wolfberg v.
Robert I. Greenberg, et al.
Case No. 88 C 3349

Dear Mr. and Mrs. Wolfberg:

The firm and the undersigned hereby withdraw as your counsel of record in the referenced case and otherwise terminate all aspects of our relationship with you. We will file the necessary motion to withdraw with the court as soon as possible. We will promptly forward all proper files to successor counsel and will provide such reasonable and good faith assistance as he may request of us. We have incurred fees and expenses as of today of approximately $1,000 more than your retainer with us; we will absorb that amount.

Our reasons for withdrawal are as follows: We undertook to represent your wife in accordance with the terms of our letter to you dated December 6, 1988. That letter is incorporated herein by this reference. Our representation was essentially to seek the removal of the Trustees under the Mal Greenberg Testamentary Trust. We specifically

stated that we would not be associated with any vindictive lawsuit, the intent of which was to impose severe punishment on or to seek massive damages from the Trustees in general or Robert I. Greenberg in particular, nor were we willing to be associated in any legal action which was characterized by a spirit to obtain these ends.

In the months since our letter, you in particular and Carolyn to a limited extent have persistently sought to expand this case beyond the foregoing limits. It is clear that you and Carolyn, to the extent she may be informed about what is going on, do not intend to abide by either the letter nor the intent of our letter. You have repeatedly stated that removal of the trustees is not what you want to accomplish, and have consistently tried to direct the primary focus of the suit to other areas. Those other areas involve issues of the kind which we specifically said we would not undertake in this action, or issues which we – and several other local attorneys – have advised you are not justiciable in Kansas. Nonetheless, each of our meetings and telephone conversations have been devoted almost exclusively to your attempting to expand the suit and our attempting to explain that we could not do so.

As a result, our relationship with you has deteriorated to such an extent that we do not believe we can continue to represent you effectively. We do not enjoy our confidence and you re not satisfied that the scope of relief

available to you under Kansas law on the facts of the case is as limited as our analysis indicates.

Sincerely,

HERSHBERGER, PATTERSON, JONES & ROTH

s/

Robert J. O'Connor

APPENDIX H

EXCERPTS FROM BACKGROUND NOTES PREPARED BY LAURANCE B. WOLFBERG AND GIVEN TO COUNSEL SEPTEMBER 27, 1988 FROM PAGE 6 OF ROBERT I. GREENBERG'S TRIAL EXHIBIT NO. 44

* * *

Bruce, I'm afraid that for us to win anything significant, we must bring Greenberg to his knees as he is the culprit. As we see it, this might be accomplished by the trust suit to be cast in such a way as to claim damages, both regular and punitive, and include in the action suitable amounts for the loss of a mother, mental cruelty, character assassination of Carolyn, attempt at alienation of affection, undue influences on active beneficiary (the mother) who is too old to fight and fearful to aid her only daughter if she wants to, and malicious attempt to exhort funds from Carolyn Wolfberg's family in his position as trustee and as self appointed dissolving partner/management for benefit of Alpha to supposedly wind up the partnership affairs on a timely basis. This size business should have been wound up in 1-6 months. He stretched it to 4 years and continues to frustrate Carolyn Wolfberg's family by not releasing gross proceeds of oil company and continuing to threaten company through continued malicious acts, garnishments without notice, impairing the SBF banking relationship. This suit should be $10,000,000 or better in claims as the suffering, loss,

deliberate actions, influence on emotions and loss of family should merit this amount or more.

Sincerely yours,

s/ Larry

Larry Wolfberg

APPENDIX I

SERVICE BUSINESS FORMS, INC.

815 East Second St. • Wichita, Kansas 67202
316-264-4315 • Telex: 437056
WATS 800-835-3191
TELECOPIER • 800-835-3215
316-263-0154

August 30, 1989

Mr. Mark Walker
Crowe & Dunlevy

Dear Mark:

SUBJECT: CIV 86-24410C
Green Wolf Partnership Dissolution.

This will confirm my previous notice to you to appeal the District Court decision on subject case.

I am concerned with your recommendation to the contrary; however, based on business and our overall legal strategy, this effort should be made.

I would appreciate knowing the basis you intend using for this appeal. I have some suggestions that you may wish to include in your brief.

The funds required on our account are being mailed this week in line with your request and our agreement.

Thanks for your attention and assistance.

Sincerely yours,

/s/ Larry W
Larry Wolfberg

(3)

Supreme Court, U.S.
FILED
OCT 31 1995

No. 95-433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF

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*LARRY L. SIMMS
JOHN K. BUSH
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Attorneys for Petitioners

**Counsel of Record*

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No. 95-433

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

LAURANCE B. WOLFBERG AND CAROLYN WOLFBERG,

Petitioners,

v.

ROBERT I. GREENBERG,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF

Petitioners Laurance B. Wolfberg and Carolyn Wolfberg respectfully submit this reply brief in support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

ARGUMENT

Although Respondent Robert I. Greenberg asserts that "this case bears no resemblance to *BMW*," Opp. at 13, he does not—and, indeed, cannot—dispute that this case raises the same issue as the second question presented in *BMW of North America, Inc.* v. *Gore*, No. 94-896: what standard should govern the review of punitive damage awards for excessiveness under the Due Process Clause? Unable to

argue that the constitutional excessiveness question is not presented by this petition, Respondent instead advances arguments that are irrelevant to the question presented or are simply arguments on the merits of the constitutional excessiveness question.

Respondent argues that the lower courts' review of the award confirms the Tenth Circuit's conclusion "that the Wolfbergs themselves were indeed afforded due process based on the record in this case." Opp. 14. The record, however, reveals that the district court's excessiveness review was limited to only one paragraph, *see* Pet. App. 27a, and that the court of appeals dispatched the issue in only two sentences, *see* Pet. 17a. Such cursory review hardly satisfies the "procedural obligation," suggested by Justice Breyer at the *BMW* oral argument, for courts "to explain some rational theory" justifying the size of a punitive damage award "when there is no obvious relationship between" the amount of punitive damages awarded and the extent of the harm. *See* Transcript of *BMW* Argument at 55. In any event, even if the procedural requirements of due process were met, that would not make the question presented by this petition any less important, because this petition calls upon the Court to set forth the standards for determining whether a particular punitive damage award, as a *substantive* matter, violates due process.

Similarly, Respondent's observation that Oklahoma law, unlike the Oregon statute at issue in *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331 (1994), permits post-verdict review, *see* Opp. 14, does not diminish the need for this Court to grant certiorari so that the *federal* constitutional standard articulated by this Court may be applied in this case.

Respondent devotes much of his brief to restating his version of the "facts" of this case in attempting to convince the Court that the Wolfbergs' constitutional excessiveness claim is unworthy of consideration. The Wolfbergs take strong issue with respondent's characterization of the record, but the issue at this stage of the case is not whether the Wolfbergs committed a wrong, but whether the

multimillion-dollar punishment against them satisfies the Constitution. As this Court observed in *Honda*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

Regardless of how respondent mischaracterizes the record in this case,[1] there remain several objective indicia that the $2,250,000 punitive exaction in this case is constitutionally excessive. For example, although respondent cites to noneconomic damages for "emotional distress, anxiety and fear" and "a lost business opportunity," Opp. 10, he does not dispute that his pecuniary damages were only approximately $34,000 in legal fees. *See* Opp. 9-10. Respondent also does not dispute that the punitive damage award in this case far exceeds the amount of punitive damages awarded in any other malicious prosecution or abuse-of-process case decided under Oklahoma law, as well as the maximum statutory fines for analogous conduct. *See* Opp. 18-19.

Apart from these factors, it can hardly be disputed that a serious question of constitutional excessiveness arises from

---

[1] For example, quoting Trial Exhibit 44, respondent asserts that "Laurance Wolfberg's directive to his attorneys discloses his intent to remove Greenberg from his position of influence within the family, destroy him emotionally and financially, and 'bring him to his knees' through multi-million dollar judgments." Opp. 2 (quoting Opp. App. 30a). Respondent fails to disclose, however, (and inexplicably fails to reprint in his appendix) the portion of Trial Exhibit 44 in which Mr. Wolfberg instructs his counsel that "I don't wish to have the suit for removal of trustee [filed] unless those skilled in that field can confirm that we could in fact prevail . . . ." Trial Exhibit 44, at 4, *reprinted in* Appellee's Supplemental Appendix at 20.

the ratio of the punitive damage award to the Wolfbergs' wealth. Regardless of which figure the Court considers for the Wolfbergs' net worth,[2] it is clear that the punitive award represents a far larger percentage of the Wolfbergs' net worth in this case than in virtually every other punitive damage case. *Cf. Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) ($25 million punitive damage award excessive where defendant had $9 billion net worth); *Kelley* v. *Sears, Roebuck & Co.*, 882 F.2d 453 (10th Cir. 1989) ($1.25 million punitive damage award excessive where defendant had $12.8 billion net worth); *Spaeth* v. *Union Oil Co. of Calif.*, 762 F.2d 865, 866-67 (10th Cir. 1985) ($3 million punitive damage award excessive where defendant had $3.3 billion net worth). The unusually high ratio of punitive damages to the defendants' net worth warrants particular attention here, given that the defendants are individuals and the plaintiff suffered relatively little harm from their conduct.

The punitive damage award in this case is an unprecedented forced redistribution of millions of dollars from a sister to her brother and from one brother-in-law to another based simply on a family squabble that escalated into civil litigation. These circumstances present a compelling context for application of the constitutional excessiveness standard to be articulated by this Court.

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[2] Although respondent cites evidence that the Wolfbergs' net worth in *1987* stood at $23.5 million, the record shows that their net worth in *1991*—the time of the judgment—was approximately $7.3 million. The Wolfbergs' financial statement from 1991, which was prepared as part of their application for the supersedaes bond, was filed with the district court on November 25, 1991, as an exhibit to Defendants' Reply Memorandum In Support Of Their Motion For Judgement Notwithstanding The Verdict, Certification To The Oklahoma Supreme Court, A New Trial Or For Remittitur Of Damages, and was reprinted on page 202 of the Appellant's Appendix.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

November 1, 1995 Respectfully submitted,

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